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Our Cover—We have now reached the ninth Chief Justice, Edward Douglas White of Louisiana (1845-1920). Several precedents were broken in his career. He was from the one Civil Law State, he was an ex-Confederate soldier, he was in the Senate when he was named to the Supreme Court (not quite unique, though nearly so), and he was a member of the Court when he was nominated for Chief Justice. He was born in Lafourche Parish, Louisiana, enlisted in the Confederate army at sixteen, was captured in the third year of the war, and was released just before the war ended. He went into politics, as all men of his education and profession naturally did in Reconstruction days, and became a member of the State Senate. Later he served for three years as Chief Justice of the Supreme Court of the State. In 1888 he was elected to the United States Senate. When Cleveland was twice blocked by David B. Hill, Senator from New York, in attempting to fill a vacancy on the Supreme Court, the President suddenly turned to the Senate and named White. He was at once confirmed by unanimous vote. This was in 1894. Upon Fuller's death in 1910, President Taft nominated White as Chief Justice, and he served until his death ten years later.

Mr. John W. Davis, in a memorial notice published in the JOURNAL in August, 1921, said of Chief Justice White:

> The reported volumes give sufficient evidence of his lofty statesmanship, of the depth of his learning, the sweep of his robust and virile mind, and of the dogged tenacity with which he clung to and defended his convictions. They exhibit too his love of logical processes, his fondness for order in argument as in government, and his constant desire to test all of his conclusions in the double light of reason and precedent. But much of the man himself escapes the printed page: the dignity of his judicial bearing, his unfailing courtesy to the bar, his patience during argument, the swift thrust of his questions, his extraordinary memory which rendered him wholly independent of written notes, and in oral deliverance the fluency and beauty of his diction and the deep and melodious tones in which he spoke—all these are for memory alone. Nor do any books record the simple beauty of his private life, his gentle kindliness to all around him and the personal modesty which covered him with the cloak that only true greatness wears. Surely this man did justly, loved mercy and walked humbly with his God.

Major Articles—George Wharton Pepper of Philadelphia, leads with a discussion of "The Lawyer's Approach to Post-War Problems." The following are of special interest; Judge Charles E. Clark, "Limiting Land Restrictions"; Professor Morgan on the Code of Evidence, final instalment; Judges Parker, Otis and Rossman on Improvement of Administration of Justice; Dean Wilber G. Katz on "What Changes Are Practical in Legal Education?"; Supreme Court Commissioner Laurance M. Hyde, "Selection and Tenure of Judges."

THE LAWYER'S APPROACH TO POST-WAR PROBLEMS

By HON. GEORGE WHARTON PEPPER

Editor's Note: In his address in behalf of the American Law Institute, before the Assembly of the American Bar Association in Indianapolis, Ex-Senator George Wharton Pepper referred to the Institute's project of trying to formulate a universal Bill of Rights, which might be commended to all Nations as an integral part of the settlement for an enduring peace based on law and justice. The Institute's plans for such a task are of necessity still in the making; but, at the request of the JOURNAL, *Senator Pepper has written for us this earnest and exploratory article, in an attempt to envision the background against which any such project for a universal assurance of the fundamental freedoms would have to be cast.*

IT is not too soon to consider plans for a durable peace. This appears to be generally conceded. If the present orgy of destruction lasts long we shall not be able to preserve sanity unless we are at least thinking about peace. If it unexpectedly comes to an abrupt end we must not be caught unprepared. The consideration of post-war plans, however, ought not at this time to mean the advocacy of any particular plan. There are too many unknown quantities in the problem. The approach, to be intelligent, should be non-controversial. Accordingly a lawyer's most useful contribution at present would seem to be an attempt to formulate the issues which sooner or later will have to be faced and decided. Such a contribution may properly begin with a visualization of the conditions under which authoritative post-war decisions will have to be made.

Planning for peace presupposes that Hitler will not be in a position to dictate its terms. The only peace worth planning is one which will come when Germany is self-conquered by exhaustion or has yielded to superior force. If Germany is thus exhausted or subdued by force the peace (as far as she is concerned) is bound to be a peace dictated to her. If the war ends in a draw the peace will follow an unpredictable agreement of some sort.

If a dictated peace should be made, the first question that suggests itself concerns the spirit in which its terms will be conceived.

As to this there are three possibilities. At one extreme there is the spirit engendered by vengeance and fear: Germany must once and for all be put in irons or dismembered and eliminated as a state. At the other extreme is the spirit of the Golden Rule: Germany must be treated as the victors would like to be treated if conditions were in reverse. In between these extremes there is a condition of mixed emotions in which vengeance is disavowed but not quenched; in which fear becomes prudence; and in which there are minor concessions to good will.

As my present purpose is merely to frame issues but not to attempt to argue them, I do not comment on the relative desirability of a peace of hatred, a peace of charity and a peace of compromise. My reading of history, however, suggests that a peace of hatred, although responsive to popular feeling, is always a breeder of subsequent wars, that a peace of charity has never been given a fair trial and that a peace of compromise is the line of least resistance for treaty-makers to follow. However loth we may be to admit that a worthy ideal is impracticable, I suggest that a peace of compromise is what we shall be in for unless in the interval the people who decide great issues shall have been transfigured by suffering. If there is any realistic alternative to compromise it is not charity but hatred.

The probability of a peace of compromise is increased when one considers who will be the parties to the ultimate agreement. If there is a blanket treaty of the Versailles type, all states which existed at the beginning of the war will be signatories. On the assumption of German collapse, the states which have had "governments in exile" will presumably be represented by the men who have maintained governmental forms in the interval. This, however, is not a very strong presumption. In any particular state it may well be that a popular uprising will immediately follow an armistice and that an entirely new governmental structure will be reared. This is suggested by what happened in 1918 in the case of no less than eighteen governments. Since such revolutions are recognized possibilities it may not be amiss to speculate about the new constitutions that would in that event be proclaimed. If there were anything like a general concensus as to the rights and liberties which should be guaranteed by such national constitutions the task of the ultimate treaty-makers might be made much less difficult. To attempt to formulate and propose a universal bill of rights is obviously an ambitious undertaking. It may, however, prove to be worth while. At worst an earnest and thoughtful consideration of such a subject could do no harm.

In addition to states now represented by "governments in exile," Sweden, Spain, Portugal and Turkey will

probably become signatories even if not actually drawn into the war. It is safe to predict, however, that the peace conference will be dominated by belligerent states which during the war shall have kept their governmental structures intact.

If Russia is still a belligerent when the war ends, her influence at the conference table will be great. If she shall have concluded a separate peace with Germany, the extent of her influence will be measured by its terms. If it leaves her a vanquished enemy she will be at the head of the class of submerged Powers. If she has become to some degree a German ally, she will not be in a position to demand much consideration.

The bare suggestion of a separate peace between Germany and Russia opens up a wide field of speculation. If, immediately after concluding a treaty with Stalin, Hitler were to propose a world peace on terms regarded as fair by American public opinion, so great a proportion of Americans might strongly favor its acceptance as gravely to prejudice the possibility of further American war effort. Even if at the time of such a proposal we had not yet begun to shoot, the closing down of our "arsenal of democracy" might force a reluctant Great Britain to come to terms with Hitler.

Nobody can predict with confidence what would be regarded as "fair" in this country. Hitler's offer (to be so regarded) would probably have to include the restored integrity of Holland, Belgium, Luxembourg, Denmark, Norway, Finland, Poland, Czecho-Slovakia, Yugoslavia, Greece and Abyssinia and a rigorous exclusion of Italy from all post-war benefits. It would also presumably have to include a guaranty of future good conduct and a cessation of all subversive activities and the submission of a plan for some sort of all-round limitation of armaments. Whether or not such a guaranty would actually be worth anything, the tender of some such terms as outlined would doubtless have a powerful effect on American public opinion.

If at the peace table Japan is in the position of a vanquished state, her expulsion from China is to be expected. In that event Manchukuo would be a troublesome problem. In the recent past it has become the policy of the United States to refuse diplomatic recognition to a regime or state if its origin is regarded here as illegitimate. It is at least doubtful whether other Powers will subscribe to that doctrine. If they did, it would be possible to date the status-quo-ante sufficiently far back to restore Manchuria to China.

Whether we shall have fought or bought our way to the peace table, the United States will be there and will doubtless exercise an important influence. If the conference occurs in Mr. Roosevelt's term, it may be that he will follow the Wilson precedent and attend in person. This course would be widely approved and widely condemned. Such a cleavage in public opinion would be regrettable and would complicate the process of ratification. Whether its possible advantages would outweigh the certain disadvantages of an acute division of domestic opinion is a question which no doubt the Executive will seriously consider. If one pictures a conference in which Mr. Churchill, Mr. Roosevelt and Mr. Stalin all take leading parts, the forecast of a compromise peace seems not unreasonable. Just how much influence the lesser states would have in such a conference is mere matter of opinion. The reference to Stalin should be a reminder that after the German menace has by common action been abated, the status of Russia as a peacetime bedfellow will give rise to much more delicate questions than the problem of military cooperation against a common enemy.

Before a conclusion could be reached around the conference table proposals of two distinct types would have had to be considered and dealt with. Of one type would be proposals respecting European frontiers and world-wide colonial possessions. Of another type would be plans for future world security.

A necessary preliminary to any settlement of these proposals should be a decision whether in the process of rectification of frontiers major emphasis is to be placed on the economic or the political aspect of the matter. It is confidently asserted by competent economists that by the time the war broke out human society had developed into an economic whole. This fact must be laid along side the other fact that political society consists of a series of diverse and self-conscious national units. The economists contend that this political diversity must be transformed by the peacemakers into something approaching political unity. This transformation, they contend, could be accomplished by the removal of international trade barriers. Assuming their contention to be sound, their ideal will be hard to attain. It is always difficult, especially when emotions are stirred, to substitute the long look ahead for the compelling impulse of the moment. It can be demonstrated that the wages of sin is death; but somehow we all keep on sinning.

It is to be expected that the first step toward rectification of European frontiers would be to restore (either absolutely or upon specified economic conditions) the status-quo-ante of states, other than France, submerged by German invasion. In this process of rectification an attempt might or might not be made to eliminate danger-spots created by the Versailles Treaty—such as the Danzig Corridor and various controversial areas in the Balkans. Next to the restoration of the status-quo-ante in Europe would come a similar series of questions with respect to Asia and Africa, including Abyssinia and territories bordering the Mediterranean. In the Far East much would depend upon the extent to which Japan had engaged in actual hostilities against Great Britain and her Allies.

An exception was above noted in the case of France because it will be difficult to determine whether she should be treated as one of Germany's victims or whether the percentage of Petains, Darlans and Lavals is large enough to brand her as fundamentally anti-

British. In the former event she should be treated like the submerged states. In the latter she would be likely to receive some disciplinary treatment both as respects European territory and overseas possessions. In spite of all community of interest between the two states there is, deep down, an incompatibility between the English and French temperaments which will always be a fact to be reckoned with when either has the upper hand.

When the problem of the status-quo-ante has been dealt with, next in order will be the determination of what further terms are to be imposed upon Germany and her then Allies. Here again two policies will confront one another. Pursuant to one, Germany's pre-war territorial status would be restored and German unity preserved but subject to stringent limitations upon every sort of military and naval activity. On the other hand, in addition to such limitations, there might be a political and territorial dismemberment of the Reich. One or the other of these policies will be adopted whether the motive be ascribed to vengeance or to prudence. If dismemberment were to be enforced it would be because political considerations had overshadowed economic reconstruction. The process might involve the re-creation of Austria and at least the separation of Prussia and Silesia from one another and from the Reich. These two states, which some authorities regard as properly belonging to Eastern rather than Western Europe, might easily be demanded by Russia if in the interval she shall have maintained herself in a position to make demands. Unless Mussolini shall have detached himself from his German alliance before it is too late he is likely to be humiliated even more than Germany. Apart from the fact of the inherent weakness of Italy's position, Great Britain will have toward Mussolini a spirit of resentment as close to vengeance as the English temperament can ever get.

In addition to the subtraction of territory from the vanquished there may be some trading among the victors. There may well be exchanges between Great Britain and the United States which would be advantageous to both. There are British possessions which have a strategic position with reference to the defence of the Panama Canal. These may be more valuable to the United States than to Great Britain. The opportunity of considering and deciding the future of the Philippines will not be lost. It may not be an impossible suggestion that as an outpost in the Far East those Islands would be more useful to Great Britain than to the United States. From the point of view of the welfare of the inhabitants, Great Britain's genius for colonial government might well insure for them a happier future under the British flag than under the Stars and Stripes.

Nothing has so far been said about states of the Western Hemisphere other than the U.S.A. That they must be parties to any post-war settlement is evident. All of them who shall have steadfastly resisted Nazi seduction will be recognized as having a common interest with the United States in formulating and pressing demands of advantage to this hemisphere. Their greatest interest, however, is likely to be taken in the plan [or plans] for future world security. Such plans are certain to engage a large part of the attention of any conference which formulates a peace dictated to Germany.

Naturally enough all thoughts are at present focused on "winning the war." There is, however, hazy realization that after fighting has stopped and the peace conference has adjourned there will remain the problem of actually effectuating the treaty settlements. This is certainly as vital a problem as any that must be faced. Fortunately a number of important aspects of treaty-enforcement can well be discussed in advance because they are matters of broad international policy. We in the United States shall be wise if we learn at least some lessons from post-war experiences in 1918 and 1919. One of these is to insist that the treaty when drawn shall clearly express whatever our pre-determined policy may be, instead of leaving that policy to be inferred from words written by a few before the policy itself has been considered by the many. It will be remembered that the Covenant of the League of Nations had to be discussed as a document already perfected, although some of its language meant one thing to its promoters and another to its critics. When debate over ratification began the view was at once confidently advanced that the Covenant committed the United States to future international action without an opportunity to exercise judgment in dealing with emergencies as they might arise. It was with equal confidence denied that there was any such commitment. The point now emphasized is that the debate over the meaning of the Covenant preceded instead of following a serious consideration of so vital a question of national policy. If there had been in the minds of the draftsmen a clear apprehension of the thought to be expressed, it is to be hoped that they would have insisted on language free from ambiguity. This hope is indulged notwithstanding the common diplomatic practise of deliberately using ambiguous language to make possible a future escape from a commitment that turns out to be burdensome. I once pressed upon Lord Robert Cecil the view that certain provisions of the Covenant really committed all signatories to follow a specified line of conduct even if that course had proved unwelcome. His reply was to the effect that under such circumstances Great Britain would not regard herself as bound. I thereupon suggested that statesmen living under an unwritten constitution might justify such an elastic interpretation when Americans, accustomed to a written constitution, would feel constrained to take the provisions of their written promise more literally. The idea that this difference of background might account for divergent views about the wisdom of a particular commitment seemed to impress him; and later he referred to it in his published account of his American mission. It is also to be remembered that the Allied Statesmen at Versailles were reluctant to be bound by

President Wilson's statement of the basis of peace with Germany unless (as Mr. Lloyd George put it) "we were in a position to insist on her accepting our exegesis of the sacred text." Of course no final determination of our international policy can be made until the Senate votes for or against ratification of a treaty previously negotiated. But a great deal of enlightening public discussion can precede even the negotiation stage and it is to such public discussion that this article is intended to be a contribution. Those who represent the United States at the peace conference ought to have had some opportunity to know in advance how currents of popular thought are running.

The fundamental point for advance discussion is whether the United States is going to accept any responsibility whatever for the actual enforcement of treaty provisions. A lesson to be learned from 1919 is to avoid creating the general impression that we are proposing a greater degree of cooperation than we actually intend. It is easy to assert unthinkingly a positive position on this fundamental issue. If the world has become an economic whole, an instant inference may be that to protect this unity the world must also be converted into a political unity and that it is part of our duty to guarantee this conversion. If such a decision is to be reached it must not be done impulsively but soberly, discreetly and with a long look ahead. The issue is as grave an issue as we have ever faced. Refusal of cooperation might emasculate the treaty. Effective cooperation might mean the loss to the world of America's uncovenanted will to peace. It would also mean a permanent military and naval establishment vastly greater than anything ever contemplated in peace-time. There is grave need of calm and realistic discussion of this fundamental problem without the use on either side of such contemptuous terms as "isolationist" or "war-monger."

If after earnest consideration our decision is to share with other powers the responsibility for treaty enforcement, the question next in order is how the extent and nature of our cooperation is to be determined. Here again there is a choice of policies. Either we should promise a course of conduct which will become automatic upon the happening of a specified event or we should reserve the right to determine our course when and if unpredictable contingencies were to occur. An objection to the former course arises from the difficulty of defining the event which is to precipitate our action. The advantage of the latter course is that we ourselves remain the judge, whether or not our obligation has matured.

If we were to commit ourselves to automatic action, our promise would be made either to one or to a few great powers or to a group of many powers organized into a league or society. If our commitment were (for example) to Great Britain, either alone or in association with one or a few other states, it would doubtless take the form of a promise to unite in preventing or redressing any breach of the treaty by any of its signatories. This would really amount to an undertaking to police the world. The duration of such an undertaking would naturally be an important consideration in view of Washington's warning against permanent alliances. Moreover, when after initial suppression or dismemberment the inevitable urge toward German unity were again to assert itself, it would be necessary to consider when something like a statute of limitations should bar further punishment for Hitler's crimes and how long new generations of German youth are to be repressed because of the sins of their forebears. Many Americans might balk at a commitment for the permanent preservation of a status created by treaty, especially if it were a status inconsistent with aspirations for national unity.

If our promise of cooperation were made to an organized group of powers and the character and extent of the cooperation of each member-power were specified in advance, the occasion for actually taking cooperative action would doubtless be a vote by the council or other executive body within the larger group. This would mean a set-up somewhat resembling the League of Nations as pictured by its critics but differing from it in that each member's quota of responsibility would be predetermined by the member's own promise. The function of the council would be merely to mature a previously accepted obligation—as, for example, to make on call a certain contribution to an international police force.

Instead of promising definite action upon the happening of a specified contingency or upon the call of a specified body, we might make a general promise of cooperation but reserve to ourselves the right to determine when we shall act and how. If such a promise were made to an organized group of powers, whether of limited or inclusive membership, we should have the League of Nations as it would have been had the United States become a member upon the terms prescribed in the Senate reservations. The objection sure to be raised to such a set-up is the element of uncertainty resulting from each member's reserved right to interpret his own obligation. On the other hand, while a commitment to do as others may prescribe gives to a league the appearance of strength, two weighty reasons may make this appearance little more than an illusion. One is that in an actual international crisis there is sure to be a destructive difference of opinion within the organization which reflects itself in official indecision and consequent ineffectiveness. The other is that, no matter how definite a promise may be, a government will be powerless to fulfill it if in the meantime the commitment has become unpopular at home. After all, an international policy to be sound must not merely look well on paper but must give controlling effect to national self-interest. Diplomats, like other public officials, are trustees for the people at home. An individual is at his best when he disregards self-interest; but the interest of those who trust him should be the first

consideration with a trustee. Much momentary enthusiasm can be aroused by an ambitious scheme for world security but no international idealism is really wholesome unless in practise it can be made to work. It is not uncommon to hear it asserted that such-and-such an international scheme would have worked if such-and-such states had not acted perversely. But action of this sort is one of the predictable facts in every international situation; and the thing styled perversity by the promoter of a plan that fails may seem like simple self-preservation to the state against which it is charged.

Such in defective outline is the picture of the conditions under which a dictated peace may have to be made. If one turns next to a situation in which the war ends in a draw and nobody is in a position to dictate to anybody else, a vastly different picture must be envisioned. All-round exhaustion would be merely a prelude to the horrors of post-war plague, pestilence and famine. These things, though inevitable after any world-war, may be forgotten for the moment by diplomats borne along on the flood-tide of victory. But when there is no victory and the fighting stops merely because of universal exhaustion, peace becomes either a wise economic settlement or a mad struggle for the means of existence. At best it may even come to pass that hatred will vanish when physical strength has ebbed. Something like a pooling of resources for the benefit of all might in that event become essential to the survival of each. Restoration of territory, limitation of armament, ambitious plans for collective security—all such considerations may have to be postponed until hunger, nakedness and disease shall have been mitigated. In such a crisis everybody would be likely to turn not so much to soldiers as to those experienced in relief work on the largest possible scale. The terms of a treaty of peace made under such conditions cannot even be guessed at in advance. The situation as it exists at the moment of admitted exhaustion would make its own treaty. When Famine becomes Public Enemy No. 1 all must unite in a desperate effort to halt it. Such a picture may constitute a powerful argument in favor of Victory at any cost; but realistic thinking must take account of the state in which the world will be if Victory proves impossible in spite of a total expenditure of blood, sweat and tears.

LIMITING LAND RESTRICTIONS[1]

By HON. CHARLES E. CLARK

Judge, United States Circuit Court of Appeals, 2nd Circuit

I SUGGEST for your consideration as desirable legislation provisions which would limit land restrictions and servitudes (a) to a definite period of years and (b) to the time during which they remain of substantial utility and benefit to the owners thereof. The first, confined to a thirty-year period, is the general purport of a rather limited Massachusetts act of 1887,[2] and of a broader Minnesota act of 1937.[3] Being new legislation affecting property rights, obviously it could apply only to interests hereinafter created. The second is the general purport of legislation existing for fifty years or more in Michigan, Minnesota, and Wisconsin,[4] and is conceived to be substantially in accord with the present law. As such, the provision could be made applicable to existing interests.

As a basis for discussion, I submit the following proposal for a statute, intentionally made somewhat broader than even its nearest analogue, Minnesota:

"All covenants, conditions, easements, profits, rights of reëntry, possibilities of reverter, or other servitudes or restrictions, hereafter created, by which the title or use of real property is burdened, but not including mortgages, trusts, or estates in possession, reversion and remainder [or for the maintenance of transmission or transportation lines], shall cease to be valid and operative thirty years after the instrument creating them becomes effective. And all such interests burdening real property, now effective or hereafter created, shall cease to be valid and operative whenever they become of merely nominal value and, through change in condition of the neighboring land or otherwise, of no actual and substantial benefit to the party or parties to whom or in whose favor they have existed."[5]

Before I discuss the proposal and the arguments which may be adduced in its support, I desire to make it perfectly clear that its form as here stated is not to be considered at all final or as more than a target to be shot at. Its very terseness may help to spotlight the issues and

1. Originally submitted as a paper before the A.B.A. Section on Real Property, Indianapolis, Ind., Sept. 30, 1941, and revised for publication.

2. Mass. Acts and Resolves 1887, c. 418; *cf.* 6 Mass. Laws Ann. (1933) c. 184, § 23.

3. Minn. Stat. (Mason, Supp. 1940) c. 59, § 8075, as amended Apr. 26, 1937, c. 487, § 1, note 5 below.

4. Mich. Stat. Ann. (1937) § 26.46; Minn. Stat. (Mason, Supp. 1940) c. 59, § 8075, note 5 below; Wis. Stat. (1939) § 230.46.

thus to provoke discussion. But details must be a matter of patient study by any group to whom the substance of the proposal may appeal. For example, the matter enclosed in brackets may be thought necessary to make clear the nonapplicability of the legislation to railroad and transmission line rights of way so-called; though I believe careful analysis shows such interests to be not easements, but possessory estates in fee.[6] Again it has been urged that a further exception should be stated to avoid the possible untimely termination of desirable developments by way of controlled subdivisions in community real estate planning—a matter I believe of such importance that I am suggesting a possible form of exception below. With this caution I shall turn first to the background against which the proposal should be viewed.

Perhaps it may be carrying coals to Newcastle to diagram for property lawyers the reasons of policy which support legislation of this type. The clog on titles which useless servitudes may offer is known to all, though, like the weather, we talk about it but do nothing. The real reason for such inactivity, I suppose, is the difficulty of getting to a really workable solution. At any rate, the references just made show how infrequent have been attempts at statutory change. Text writers from time to time have touched upon the matter. Some twenty years ago Dean Fraser, of Minnesota, recommended legislation along the lines recently adopted in his state.[7] Professor Walsh of New York has been an earnest advocate of such a course.[8] The proposed Uniform Estates Act, in which our good friend Henry Upson Sims has had the laboring oar, contained a restriction of powers of termination (rights of reëntry) and of possibilities of reverter to twenty-one years.[9] Within the last year two most valuable discussions have appeared, to which I am especially indebted. One is Mr. Milton Goldstein's article in the Harvard Law Review entitled "Rights of Entry and Possibilities of Reverter as Devices to Restrict the Use of Land."[10] The other is by another good friend, the leading title official, Charles C. White of Cleveland, entitled "Reversionary Restrictions," in the University of Cincinnati Law Review.[11] And there have been other valuable discussions of like tenor.[12] The situation is likely to be brought to a head, so to speak, by the pending Restatement of Property on the Law of Servitudes by the American Law Institute.[13] I suspect that the attempt to bring some order out of the existing chaos of the precedents will even stump those ubiquitous exponents of an existing and a determinable—or at least restatable—common law.

Now it is obvious that a good share of our present confusion is a direct legacy from the common law and illustrates once again the often hampering inhibitions developed from our history, wherein legal interests substantially similar grew up differently. Thus, probably the most drastic and burdensome restrictions of all come down from the common law without any substantial mitigation of their harshness. The right of reëntry for condition broken gives a present stranger to the title—in any realistic sense of the term—the absolute option to terminate the estate once the stated contingency has happened. Even more drastic is a possibility of reverter after a determinable fee, for that cuts off the fee, so the theory goes, the moment the contingency happens and without action of any party. These are still with us in pristine, if not added, force. For the possibility of reverter, according to the preponderant view, is freely transferable; while the reëntry right—at common law exercisable only by the original owner or his representative, i. e., executor or administrator—is being more and more made assignable by statutes.[14] Again, easements in gross and affirmative covenants are simply dismissed as unrecognized land interests in England; but in this country they are accorded a more or less precarious privilege of existence in various jurisdictions, with perhaps a fairly definite trend, supported partially by the Property Restatement, to give them some standing as assignable interests.[15] On the other hand, the equitable restriction, perhaps of all servitudes the most popular, as it is in many ways the most simple and useful, has a natural scope, definitely limited to the period when it benefits the surrounding land. While this is arrived at through the procedural processes of a court of equity, as distinguished from the so-called required recognition of all legal interests, yet the end conclusion seems in effect to prolong the life

5. The Minnesota statute is as follows:
"(a) Wherever any conditions annexed to a grant, devise or conveyance of land are, or shall become, merely nominal, and of no actual and substantial benefit to the party or parties to whom or in whose favor they are to be performed, they may be wholly disregarded; and a failure to perform the same shall in no case operate as a basis for forfeiture of the lands subject thereto.
"(b) All covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected, shall cease to be valid and operative thirty years after the date of the deed or other instrument, or the date of the probate of the will, creating them; and after such period of time they may be wholly disregarded."
The 1937 Act is subdivision (b) above, added to the earlier statute, subdivision (a).

6. See my book on Real Covenants and Other Interests which "Run with Land" (1929) 65, 66.

7. Fraser, *Future Interests in Property in Minnesota*, 3 Minn. L. Rev. 320, 338 (1919).

8. Walsh, *Conditional Estates and Covenants Running with the Land*, 14 N. Y. U. L. Q. Rev. 162, 191-194 (1937).

9. § 15.

10. 54 Harv. L. Rev. 248 (1940).

11. 14 U. of Cin. L. Rev. 524 (1940).

12. Ferrier, *Determinable Fees and Fees upon Conditions Subsequent in California*, 24 Calif. L. Rev. 512 (1936); Note, 28 Mich. L. Rev. 1015 (1930).

13. Tentative Drafts dealing with Easements (including Profits) and Licenses have already been issued. Professor Oliver S. Rundell, the reporter, together with his advisers, of whom I have the honor to be one, is now working on Preliminary Drafts dealing with Covenants Running with the Land and Equitable Restrictions.

14. 1 Restatement, Property (1936) §§ 159-161. See Explanatory Notes (Tent. Draft No. 4, 1933) § 200; 1 Tiffany, The Law of Real Property (3d ed. 1939) 107-112; 3 Simes, The Law of Future Interests (1936) 159; 18 Col. L. Rev. 84 (1918).

15. Compare Restatement, Property, Group 2 (Tent. Draft No. 10, 1938) §§ 41-48, with Explanatory Notes and pending Preliminary Drafts on Covenants and Agreements Respecting Use of Land; and compare, also, 165 Broadway Building, Inc. v. City Investing Co., 120 F. (2d) 813 (C. C. A. 2d, 1941).

of the less useful of the restrictions while the more useful of them are sharply curtailed to their reasonable uses.

It is not fair, however, to ascribe such a result entirely to history. We often get away from our history even in law when it is no longer useful. When it survives, there is usually a definite reason therefor. The reason here is our confused ideas as to what should be the underlying public policy. In fact, clashing here are the opposing theories, both of ancient lineage, both of present value. One is that of the freedom of the landowner to do what he will with his own, buttressed by our realization that actually he does usually know the most effective way of making his land useful or salable. If he wants to encumber it with restrictions, he is doing so because he knows, or has good reason to think, that these will promote, rather than diminish, his land values. And the other is the equally important policy against encumbrances or clogs on title which may operate in future years to prevent valuable sales or other socially advantageous utilization of property by keeping the title in a state of substantial confusion.[16]

I submit that the attempt to reconcile these opposing principles and to announce general and abstract rules supposedly applicable to varying situations can produce only confusion as it has done. The way out is not free rein to either policy to the exclusion of the other. Indeed, I fear that the Property Restaters are going to fall into the error of overemphasis on one of these policies alone. Even though in the field of covenants, they are emphasizing freedom from title clogs, yet with respect to easements in gross, they have worked out a quite new and novel principle to justify assignability of these perhaps the most personal and the most limited of all servitudes, and thus the ones most likely to be forgotten by their possessors, but not by title searchers. In the tentative Restatement[17] all "commercial" easements in gross are made freely assignable, while "noncommercial" ones may or may not be, depending on "the manner or the terms of their creation," a distinction which seems to me quite confusing and uncertain. Is a right of way for the parking of one's car on a neighbor's property noncommercial merely because one's car is not a truck? And what is the poor title searcher to hold when he strikes, say, a fifty-year-old right of way of this character? I fear a lessened clarity, if anything, in our law, should this novel view be accepted as restated law.[18]

But drastic restrictions on the running of affirmative covenants with the land may be equally objectionable from the opposite viewpoint of reasonable use of land. There is still a split among the Institute advisers as to whether or not the ancient rubric of privity of estate shall be applied to require some tenure or conveyance between the contracting parties for the running of the covenant, a requirement of most doubtful historicity and clearly unconnected with any purpose or utility of the covenant itself—one operating by mere chance where conveyancers have not known the utility of arranging an exchange of crossdeeds to supply the missing tenure link.[19] All this suggests the confusion of purpose and of objective so characteristic of this field, but it does not offer hope of sound and reliable rules for the conveyancer or the title searcher to follow in his day-to-day activities.

I submit further that the correct approach to the problem is to shorten the potential *duration* of the interest. The immediate parties to a conveyance should be trusted, subject to our existing rules as to restrictions on alienations, to determine whether or not a servitude is of immediate value to them. Usually, as indicated, it will have such value or the parties would not be negotiating on the basis of its existence. But after a few years its initial importance has probably lessened so that very likely only a nuisance value remains. To meet this situation at least in part, we have at hand the already existing rule of equity that equitable restrictions are unenforceable after their purpose can no longer be achieved because of change of circumstances. This rule should be clearly stated to be applicable to all servitudes, as logic and convenience alike appear to demand. And it should be supplemented by a direct and simple provision, upon which the conveyancer and title searcher can rely without extensive investigation or court proceedings, by which the title of the servient land is made wholly free after a period of years. Hence the suggestion of legislation going to the vital question of temporal duration of the interest is, I believe, the reasonable and appropriate solution of our problem.

Of course, it is obvious that such legislation will not immediately hit all cases. Under our constitutional prohibitions one cannot legislate an existing interest of infinite duration into one of thirty years only. Legislation setting a time period of such interest must necessarily be prospective only. It will therefore be some time before it is fully operative, but in land law generations pass quickly; and while many of us present may not realize all the benefits of it, I think we can be sure that in a not overlong space of time such a provision will be doing good service in promoting land utility. And if further it can be supplemented by the suggested provision, applicable to existing estates, of

16. "Surprising as it may seem, experience has shown that the failure to assemble large tracts of land by purchase alone is due as frequently to the need for clearing doubtful titles as it is to the demand of 'hold-outs' for exorbitant prices." Robbins, *Problems in Land Assembly*, in Walker, Urban Blight and Slums (1938) 172, at 175. The author cites troublesome, though amusing, problems of the Housing Division of the Public Works Administration, such as of locating 200 scattered members of a lodge in order to secure individual releases, or in another instance of a divorced husband ultimately found sleeping in a barn and evading the government representative because he thought a "G" man was after him.

17. See note 15 above.

18. *Cf.* my Real Covenants and Other Interests which "Run with Land" (1929) c. III.

19. See note 15 above, also my Real Covenants and Other Interests which "Run with Land" (1929) c. IV.

termination by change of circumstances, the effect of such legislation will begin to be felt at once.

Whether this additional provision can be made immediately effective, of course, depends on whether it can be considered a fair statement of the present law. It is undoubtedly true that some courts may hesitate at such a conclusion. But the law as applicable to equitable restrictions is now well settled, although it is a matter of comparatively recent development.[20] No valid distinction—save possibly one of continuance of outworn procedural distinctions between forms of remedy—can possibly be drawn between the equitable restriction and most, if not all, of the other servitudes here involved. Indeed, it is submitted that the law is tending that way and that legislation can properly give it the final push. The analyses of Messrs. Goldstein and White, cited above, disclose the existing situation. There is very little law in absolute opposition. Supporting it, in addition to the views of the text writers cited, are decisions from California and strong statements of view from Missouri.[21] This accords with the settled view that a condition which becomes illegal or otherwise impossible of fulfillment is no longer operative.[22] The obvious similarity of the condition cases and the restriction cases, together with the reasonableness of the rule, presages its wide adoption with respect to conditions as well as restrictions.

One procedural detail may militate the other way. It has been suggested, notably in cases in New York, that even where an equitable restriction cannot be enforced because of changed circumstances, yet there may still be a remedy at law and, as it is said, the parties are then to be limited to their legal remedy. Following this, one case at least holds that a vendee may refuse title because of this possibility of a legal action.[23] Such a holding, it is submitted, has no plausible basis in policy or law. Even on technical procedural grounds, if the restriction is unenforceable in equity, there can be no real injury at law justifying the award of damages. The rule has been well criticized by Dean Pound and others.[24] So technical and unsubstantiated a doctrine should not be relied on to prevent the development of a well-founded rule which can well be aided by the legislative process.

If we are in agreement thus far I suspect that the only remaining questions which will occur to property lawyers are those dealing with the rather wide extent given above to the proposed legislation and with possible details of form and expression. As to the latter I may repeat that, while there may be very definite holes in the suggested statute, that is a matter for careful and patient examination of scholars hereafter when agreement on policy has been reached. I might say in general that the wording has been developed from the statutes referred to, with appropriate changes for the wider objectives thought desirable.

As to such wider objectives, I suspect that at least two questions will occur to property lawyers: first, whether such a statute should wisely apply to easements and profits, and second, whether it should wisely apply in general to appurtenant interests, of which easements are a natural example and where the servitude itself is attached to and transferred as a part of an existent dominant parcel of land. This may well be a matter for some discussion, perhaps some difference of opinion. I submit, however, that all these interests are so substantially similar that restriction of some of them only will leave a lopsided and uncertain law subject to the abuses we have had in mind, and that no harm to really desirable legal relations will be done by the broader statute.

Turning for a moment to the existing statutes, that of Massachusetts applies in terms to "conditions or restrictions unlimited as to time."[25] The great defect of the act is that, as Mr. Goldstein puts it, it is merely "a constructional palliative," that is, it applies only in the absence of a definite expression of intent and may easily be set aside by an express showing of intent to encumber the realty for lengthy periods of time.[26] But it does apply to conditions or restrictions. Once the rule is made applicable to restrictions, we have it applicable, of course, where it will be important and useful, but also to an interest substantially like the ordinary easement and one which is notably appurtenant to other land.

The Minnesota statute of 1937 is broader in terms to begin with, since it applies to "all covenants, conditions, or restrictions hereafter created by any other means, by which the title or use of real property is affected."[27] This provision is so broad that it might well be considered to include all interests. Certainly there seems no intermediate logical stopping point; from the standpoint of clarity alone, it would be desirable to include all the others here named. The statute itself

20. This rule is now so well settled that the landowner may now have affirmative relief quieting his title against such restrictions. *Cf.* Osius v. Barton, 109 Fla. 556, 147 So. 862, 88 A. L. R. 394, with annotation at p. 405 (1933); Hess v. Country Club Park, 213 Cal. 613, 2 P. (2d) 782 (1931); Clark, Real Covenants and Other Interests which "Run with Land" (1929) 163-165.

21. See Letteau v. Ellis, 122 Cal. App. 584, 10 P. (2d) 496 (1932) (with hearing denied by the California Supreme Court), holding that a condition subsequent becomes inoperative because of change of circumstances of the property. This case was followed in Forman v. Hancock, 3 Cal. App. (2d) 291, 39 P. (2d) 249 (1934), and has been approved by the text writers. See Walsh, Goldstein, and White, notes 8, 10, 11, above; 17 Minn. L. Rev. 227 (1933). To the same effect is the strong statement in Koehler v. Rowland, 275 Mo. 573, 587, 205 S. W. 217, 221 (1918).

22. See Scovill v. McMahon, 62 Conn. 378, 26 A. 479 (1892); Mahoning County v. Young, 59 Fed. 96 (C. C. A. 6th, 1893), Lurton, J., involving grants of land for use as cemeteries; and Hite v. Cincinnati, I. & W. R. R., 284 Ill. 297, 119 N. E. 904 (1918), involving a grant on condition of receiving railroad passes, where the condition was made illegal by subsequent legislation.

23. Bull v. Burton, 227 N. Y. 101, 124 N. E. 111 (1919), a four-to-three decision.

24. See Pound, 33 Harv. L. Rev. 813, at 820, 821 (1920); Clark, Real Covenants and Other Interests which "Run with Land" (1929) 153.

25. See note 2 above.

26. Goldstein, note 10 above, at pp. 254, 255 of 54 Harv. L. Rev.

27. See note 5 above.

has the great merit that it is an absolute rule of law causing the restrictions to cease to be valid and operative thirty years after their date, whatever the provisions of the original instrument.

As to the other statutes doing away with these interests when they become of no actual or substantial benefit to the parties, the three statutes, Michigan, Wisconsin, and Minnesota, apply in terms only to "conditions."[28] Yet, as we have seen, the settled law already applies a like rule to equitable restrictions; and again there seems no reason for the distinction. The simple easement may be as burdensome after its utility is outworn, may definitely clog the title as much, as an equitable restriction or condition.

Of course, if the parties wish to create an interest of this kind for longer duration, the way is quite open to them. Instead of making, for example, an easement or a profit, they can create an actual possessory estate limited in quantity and quality as they wish, but nevertheless not within our suggested rule. This is not a mere distinction of words. It is a distinction, it is submitted, of substance. It is based upon the extent of the *economic* interest, which is pretty definitely translatable into dollars and cents. If an interest, of which the full possession is in another, is important enough to be made to last for more than thirty years, it is important enough to be conveyed as a definite, though limited, estate. Public utility rights of way and mineral grants are well known examples.[29] Even in the supposed case of approach through a neighbor's land to one's garage, the definite grant of the use of the land itself in common with the original owner or otherwise is as easy to arrange as is the mere easement. And if it is intended to be thus valuable, the difficulties of the clog on title are likely to be less because it will then be an interest sufficiently important to be passed on, under very definite rules of law or acts of the parties, to some definite owner who can be bought out or otherwise disposed of as are property owners generally. It is the limited interest, becoming of little or no value, and therefore forgotten by every one except the title searcher, that we need to reach.

This rationale may tend to support the objections I have received from the community-planners that the statute strikes down too soon restrictions yet worth while as supporting and upholding desirable community developments of real property. These objections appear persuasive, at least in those as yet too occasional instances of carefully planned developments, so much so that perhaps an exception to the statute should be worked out for their benefit. Such an exception applicable to the first provision alone might be made to depend on the majority action of the landowners in such substantial community schemes of property development. It might take one of several forms, such as the execution by a majority of the owners involved of an instrument showing either termination of the restriction or its renewal (for another thirty-year period), depending upon whether easy termination or easy continuance of the restrictions is desired. Tentatively I suggest, however, that it may well be made to depend upon some provision of the original plan, perhaps to the effect that where the restrictions have been created pursuant to a general plan, duly recorded, of development of several parcels of neighboring property, which plan contains provisions whereby termination or continuance of the restrictions may be had through action of a majority of the present owners of the property, then the provisions of the plan shall govern in place of the statutory provision.[30]

Such an exception obviously requires careful consideration of its policy and most careful drafting. But I think it can be worked out with justice to the opposing interests here involved. With or without such modifications, as policy judgments may determine, I submit the above draft as legislation which in its general plan and scope is effective and desirable in land economy, and as meriting consideration and support.

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28. See note 4, Page 737.

29. See note 6, Page 738.

30. As appears substantially in the plan set up for the model town of Radburn, N. J. Radburn, Protective Restrictions and Community Administration (City Housing Corporation, 1929) 17, 18. See, in general, Monchow, The Use of Deed Restrictions in Subdivision Development (Institute for Research in Land Economics, 1928); Ascher, *The Extramunicipal Administration of Radburn*, 18 Nat. Munic. Rev. 442 (1929); Ascher, *Reflections on the Art of Administering Deed Restrictions*, 8 J. Land & P. U. Econ. 373 (1932); Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 Yale L. J. 407 (1928); Notes, 51 Harv. L. Rev. 320 (1937); 7 U. of Chi. L. Rev. 710 (1940).

THE CODE OF EVIDENCE PROPOSED BY THE AMERICAN LAW INSTITUTE

By PROFESSOR EDMUND M. MORGAN
Harvard Law School

(CONCLUDING INSTALLMENT)

Rule 904. Effect of Presumptions

1. Subject to Rule 903, when the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until either evidence has been introduced which would support a finding of its non-existence or the basic fact of an inconsistent presumption has been established.

2. Subject to Rule 903, when the basic fact of a presumption has been established in an action and evidence has been introduced which would support a finding of the non-existence of the presumed fact

a. if the basic fact has no probative value as evidence of the existence of the presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if the presumption had never been applicable in the action.

b. if the basic fact has any probative value as evidence of the existence of the presumed fact, whether or not sufficient to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact has the burden of persuading the trier of fact that its non-existence is more probable than its existence.

3. Subject to Rule 903, when the basic facts of two inconsistent presumptions have been established in an action,

a. if the basic fact of each presumption either has no probative value, or has any probative value, as evidence of the existence of its presumed fact, the existence or non-existence of the presumed fact is to be determined exactly as if neither presumption had ever been applicable in the action;

b. if the basic fact of one of the presumptions has no probative value as evidence of the existence of its presumed fact, and the basic fact of the other has any probative value of the existence of its presumed fact, whether or not sufficient to support a finding of the presumed fact, the party asserting the non-existence of the presumed fact of the other has the burden of persuading the trier that its non-existence is more probable than its existence.

This was very frankly a compromise. The Reporter and some of the Advisers would have preferred to adopt the so-called Pennsylvania rule which requires the party asserting the non-existence of the presumed fact to bear the burden of persuasion in all cases wherein the existence of the presumed fact is established. They recognized, however, that in *Western & Atlantic Railroad v. Henderson*, 279 U. S. 639, the Supreme Court had declared unconstitutional a statute which provided that the establishment of the basic fact put upon the party asserting the non-existence of the presumed fact the burden of persuading the jury of such non-existence, because the basic fact in that case had no probative value as evidence of the existence of the presumed fact. Though this decision has been somewhat weakened by *Seaboard Air Line Railway Co. v. Watson*, 287 U. S. 86, and *Morrison v. California*, 291 U. S. 82, still it has not yet been definitely overruled. Consequently the Thayerian rule, which was approved in the Henderson case, was adopted for prosumptions the basic facts of which have no rational probative value as evidence of their respective presumed facts. To all other presumptions the Pennsylvania rule was made applicable.

The objection which many lawyers and judges urge against the Thayerian doctrine is this: If considerations of convenience or policy are of sufficient weight to justify the creation of a presumption, it is absurd to hold that they are completely overcome by the mere introduction of evidence which the trier of fact refuses to believe; such evidence does not advance the inquiry for the trier a single step. The attempt to avoid this absurdity is reflected in the cases which require evidence which the jury believes, or evidence from disinterested witnesses, or evidence which is substantial. To adopt such a requirement is impracticable. It is the considered opinion of almost all the Advisers and Members of the Council that a presumption, to be an efficient legal tool, must (1) be left in the hands of the judge to administer, and not be submitted to a jury for a decision as to when it shall cease to have compelling force; (2) be so administered that the jury never hear the word presumption used, since it carries unpredictable connotations to different minds; and (3) have enough vitality to survive the introduction of opposing evidence which the trier of fact finds to be worthless or of slight value.

Except as the proposed rule contains the limitation imposed by the Henderson case, it meets these tests and obviates the objections urged against the Thayerian doctrine. If a party has the burden of persuasion of the non-existence of the presumed fact, he cannot discharge it

by the introduction of evidence which has no convincing power with the trier of fact. His evidence must be credited and must have persuasive force. This obviously satisfies the critics of Thayer, but does it go too far? If a presumption is to have any appreciable effect other than merely fixing the burden of producing evidence, it can have no less effect than would be given to an item of evidence of sufficient weight to tip mental scales which are in equilibrium. This is not to say that the presumption is evidence or is to be treated as evidence. It is to say merely that a presumption is a procedural device for securing a decision of a disputed question of fact when the mind of the trier is in equilibrium, that is, when the trier thinks that the existence and non-existence of the fact are equally probable. A tiresome statement of the obvious in an attempt to make this clear may be tolerated.

Under our adversary system of litigation the court is required to know all the applicable rules of law, but it knows nothing concerning the facts of a specific case. The court does not act of its own motion. The litigants must overcome its inertia. The party desiring the status quo changed must get his adversary before the court, and the parties must make known the exact matters in dispute. Which party shall make known what facts? Under the rules of pleading, which have been evolved by countless decisions, the plaintiff's statement of claim will be insufficient unless he alleges certain facts, and will be sufficient if he does allege them, although other facts not inconsistent with them may exist which will prevent him from recovering. These other facts the defendant must allege, if he is to rely upon them. In other words, the court, at the pleading stage, allocates the burden of allegation of specific matters to one party or the other, and in the absence of allegation assumes the fact against the party having the burden. Thus in an ordinary action for breach of contract, the court will assume that there was no consideration for defendant's promise unless the plaintiff alleges consideration; it will likewise assume that there has been no accord and satisfaction unless the defendant alleges accord and satisfaction. At the stage of the trial, where the facts are to be made known by evidence, a similar rule has been evolved. It might well have been held that when a trier could not make up its mind from the evidence whether or not an alleged fact existed, the result should be a mistrial, as is the case where a jury disagrees. It is universally held, however, that in such a situation the party having the burden of persuasion must lose. In other words, the court allocates the burden of persuasion in much the same way as it allocates the burden of pleading; and in the same way, in the absence of a showing which persuades the trier, the fact must be assumed against the party who has the burden of persuasion. This assumption operates only where the trier is not persuaded. Thus, if the trier is persuaded that P's proposition is more probably true than not, it makes no difference whether P or D has the burden of persuasion. The same is true if the trier is persuaded that P's proposition is more probably untrue than true. It is only when the trier's mind is in equilibrium that the allocation of the burden matters; in such event, it determines the result.

Surely it is reasonable to give to a presumption the perfectly definite effect of (1) fixing the risk of non-production of evidence sufficient to justify a finding of the non-existence of the presumed fact and (2) determining the result where without it the mind of the trier is in equilibrium as to the existence or non-existence of the fact, in those cases where the basic fact has some probative value as evidence of the presumed fact. For it must be remembered that the reasons which cause the creation of presumptions are very similar to those which cause the fixing of the burden of persuasion.

The Rule seems easy of application. The judge need never mention the word, presumption, to the jury. As in cases where no presumption is involved, he need determine where the burden lies only after all the evidence has been introduced; for it is not until that time that he need rule either upon order of argument to the jury or upon requested instructions, and not until that time will the jury have any concern with burden of persuasion.

The application at a trial of Paragraph (2) of the proposed rule is as follows:

I. If the basic fact has no value as evidence of the presumed fact—

A. When the basic fact is established without decision by the jury, then,

1. if there is no evidence justifying a finding contrary to the presumed fact, the presumed fact must be taken as true; but

2. if there is evidence justifying a finding contrary to the presumed fact, the judge does not mention the presumption to the jury, but submits the case to them or refuses to submit it to them, exactly as if the presumption had never had any effect in the case.

B. When the basic fact has to be established by the jury upon evidence, then

1. if there is no evidence justifying a finding contrary to the presumed fact, the judge instructs the jury that if they find the basic fact, the presumed fact must be taken as true;

2. If there is evidence justifying a finding contrary to the presumed fact, the judge does not mention the presumption to the jury, but submits the case to them or refuses to submit it to them, exactly as if the presumption had never had any effect in the case.

II. If the basic fact has any value as evidence of the presumed fact—

A. When the basic fact is established without decision by the jury, then,

1. if there is no evidence justifying a finding contrary to the presumed fact, the judge instructs the jury that the presumed fact must be taken as true; but

2. if there is evidence justifying a finding contrary to the presumed fact, the judge says nothing about a presump-

tion, but leaves the jury to find the existence or non-existence of the presumed fact upon all the evidence, instructing them that the party asserting the non-existence of the presumed fact has the burden of persuading them that its non-existence is more probable than its existence.

B. When the basic fact has to be established by the jury upon evidence, then

1. if there is no evidence justifying a finding contrary to the presumed fact, the judge instructs the jury that if the basic fact is established, then the presumed fact must be taken as true; but

2. if there is evidence justifying a finding contrary to the presumed fact, the judge says nothing about a presumption, but instructs the jury that if they find the basic fact they must also find that the presumed fact exists unless upon all the evidence they are persuaded that its non-existence is more probable than its existence.

The question remains whether the Rule is as easy of application as it seems. It will be noted that it requires the trial judge to decide whether the basic fact has any probative value as evidence of the existence of the presumed fact. Now, judges are constantly confronted with the task of determining whether an item of evidence has sufficient probative value to justify a finding. They are rarely confronted with the necessity of determining whether an item is utterly without probative value. That sort of question has been stated in the Supreme Court of the United States as determinative of the validity of certain statutory presumptions. It seems to be taken for granted that a legislature may give to an item of evidence greater probative value than the courts have theretofore been willing to give it, provided the item has some inherent probative value. In the Henderson case, the Court declared that the happening of a collision at a railway grade crossing had no probative value as evidence of defendant's negligence though two out of the four situations which the Court thought to be possible posited negligence of the defendant. In *Casey v. United States*, 276 U. S. 413, Mr. Justice Holmes, speaking for the majority, found a rational connection between the basic fact, possession of a narcotic drug in a specified district, and the presumed fact, purchase in that district. Mr. Justice McReynolds tersely answered: "The suggested rational connection between the fact proved and the ultimate fact presumed is imaginary." Judicial opinions of this sort and the experience of men on trial and appellate courts were the bases of powerful arguments at the Annual Meeting in 1941 that the proposed rule was much too complicated, and if adopted would be the source of much litigation. These arguments seemed to be convincing to a majority of the members present.

Further argument was made against the rule that it represented the law in no jurisdiction at present. The Rule could be simplified by making all presumptions fix the burden of persuasion, but (a) such a proposal would be contrary to the existing law in most states and in the Federal Courts and (b) would invite attacks on its constitutionality in view of the Henderson case. It was further pointed out that the Supreme Court of the United States had approved the Thayer doctrine, that this doctrine had recently been accepted in a number of states, and that it is supported by almost numberless dicta. As a result of the discussion the Institute by a small majority vote approved a rule consisting of the first paragraph of the proposed rule and substituting for the second and third paragraphs substantially the following:

"(2) Subject to Rule 903, when the basic fact of a presumption has been established in an action and either evidence has been introduced which would support a finding of the non-existence of the presumed fact or the basic fact of an inconsistent presumption has been established, the existence or non-existence of the presumed fact is to be determined exactly as if no presumption had ever been applicable in the action."

There can be no question that this substitute is simple and easy of application. The only query is whether the simplicity and ease are acquired at too great a price.

J—Judicial Notice

In our system of litigation the functions assigned to the judge make necessary the assumption that he knows and will apply the law as embodied in the pertinent public statutes and judicial decisions. It must be assumed also that he is acquainted with such matters of generalized knowledge as are so well known as to be incapable of dispute among reasonable men in contemporary society. Without such knowledge no judge could perform the duties assigned to him. Hence, except where the prohibition against reversal for invited error applies, it is usually held to be reversible error for the trial judge to overlook or misapply an applicable statutory or common law rule, or to disregard or deny accepted and well-known propositions of generalized knowledge. Rule 1001 restates this settled common law rule.

Judicial notice is an instrument for expediting litigation and for aiding the accomplishment of accurate results by eliminating from the issues to be determined by the trier under the rules of evidence matter—

a. which is so generally taken to be true in the adjustment of human relations in contemporary society that in the existing state of knowledge it is incapable of dispute among reasonable men, or

b. which is capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy, or

c. which in application to the case in hand has the same operative effect and requires the same skill and technique in ascertaining as an applicable rule of the common law or an applicable statute of the forum, and should not, therefore, depend for its decision upon the available admissible evidence which the litigants are intelligent and industrious enough to offer.

Of all such matter the judge should be empowered to take judicial notice and should be compelled to do so upon a request of a party, subject, however, to proper safeguards both for the judge and for the parties. The

parties should be protected from unfair surprise, and should, therefore, have an opportunity to be heard upon the questions, whether the matter falls within the realm of judicial notice or within the realm of evidence, and what is to be the content of the matter noticed. On these they should have the right to present to the judge all pertinent information regardless of the usual exclusionary rules of evidence. On the other hand, the judge should have the option of refusing to take such notice unless the parties furnish him sufficient data to make clear both the propriety of taking the notice and the tenor of the matter to be noticed. He should not, however, be limited to the data thus presented but should be free to consult any available source of pertinent information. And finally he should refuse to take notice of a matter unless the information which has been presented to him and gathered by him convinces him that the matter clearly falls within the realm of judicial notice. Otherwise he should require it to be made the subject of proof by evidence.

In accord with the foregoing principles Rules 1001 and 1002 make proper subjects of judicial notice:

a. specific facts so notorious as not to be the subject of reasonable dispute, and

b. specific facts and propositions of generalized knowledge which are capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy; and

c. private acts and resolves of the Congress of the United States and of the legislature of the state of the forum and duly enacted ordinances and regulations of governmental divisions or agencies of that state, and the common law and public statutes of every other state, territory and jurisdiction of the United States.

To protect the parties Rule 1004 requires the judge to inform them of the tenor of any matter to be judicially noticed by him and to afford each party reasonable opportunity to present relevant information both upon the tenor of the matter and upon the propriety of taking judicial notice of it. For the same reason a party requesting the court to take judicial notice must by Rule 1003(c) give the adversary sufficient notice to enable him to oppose the request. To protect the judge, Rule 1003 makes the compulsory taking of judicial notice dependent upon the party's furnishing the judge with adequate information. To protect both judge and parties, Rule 1004 provides that in the investigation to determine whether judicial notice of a matter is to be taken or the tenor of the matter, if noticed, no rule requiring the exclusion of relevant evidence shall apply and the judge may consult and use any source of pertinent information, and that the judge shall not take judicial notice unless convinced that the matter is a proper subject of such notice.

The uncertainty in practice as to the procedure by which the trier of fact is made acquainted with or uses matter judicially noticed, and concerning the powers of the trial and appellate courts regarding the action at the trial with reference to judicial notice, makes necessary Rules 1005 and 1006, (1) and (3), which provide as follows:

If a matter judicially noticed would, in the absence of such notice, be determined by the trier of fact, the judge—

a. if the trier of fact, shall include in the record of trial a statement of the matter as so noticed;

b. if not the trier of fact, shall direct the trier to find the matter as so noticed.

The failure or refusal of the judge to take judicial notice of a matter, or to instruct the trier of fact to make a particular finding with respect to the matter, shall not preclude the judge from taking judicial notice of the matter in subsequent proceedings in the action.

The reviewing court in its discretion may take judicial notice of any matter specified in Rules 1001 or 1002 whether or not judicially noticed by the judge.

There is no question that rulings upon matters of judicial notice are ordinarily subject to review. In reviewing matters of fact in actions at law, however, a finding is not upset unless unsupported by the evidence. Since many courts treat a judge's finding as to the law of a sister state as a finding of fact, Rule 1006(2) expressly makes the rulings of the judge under Rules 1001 to 1005 subject to review.

Conclusion

As to the form of the Code, it is to be noted that it is so drafted that it can be adopted as a body of rules by those courts which have the power to regulate evidence and procedure by rule or can be enacted as a code of evidence by a legislature.

As to substance many of its provisions are such as would be embodied in a restatement were the American Law Institute undertaking a Restatement of the Law of Evidence similar to that of the Law of Contracts or of Trusts. This is not to say that any one of these provisions is universally accepted, but it does mean that none of them is universally rejected. The law of evidence is in such a confused and confusing condition that it is almost impossible to draft a rule which is universally accepted without qualification. On the other hand, many of the rules, if adopted, will make important changes in the common law. They call for serious consideration by the Bench and Bar; and in considering them the members of the profession should have constantly in mind the disturbing truth that more and more of the problems which are traditionally solved by lawyers and judges are being taken from the courts and handed over to private arbitrators or to official administrative tribunals. To what extent this phenomenon is due to the obstructions to the prompt and efficient investigation and determination of disputes which have been interposed by antique rules of procedure and the exclusionary rules of evidence is a question which deserves more than passing attention.

Improving the Administration of Justice

EDITORIAL NOTE: At a joint session of the special Committee on Improving the Administration of Justice and the National Conference of Judicial Councils, held in the Auditorium of the War Memorial Building in Indianapolis on September 30, 1941, three notable addresses were delivered. Because they afford in comparatively brief compass such a useful compendium of a year's work on a subject of perennial importance, they are presented here in full.

THE WORK OF THE COMMITTEE

By HON. JOHN J. PARKER

Chairman, Special Committee on Improving the Administration of Justice

NO more important duty confronts the bench and bar of America today than improving the administration of justice in our courts and administrative tribunals. We have done a fairly good job in bringing the substantive law into harmony with the life of the times; but the adjective law, that which deals with court procedure, is woefully antiquated and cumbersome. In almost every state, rules and practices are countenanced which are a reflection upon the learned and patriotic men who constitute its bench and bar.

The Committee on Improving the Administration of Justice has been set up as an effort on the part of the American Bar Association to remedy this condition. Its work at this time is peculiarly important; for that work is no less than an effort to make the processes of democracy efficient in the places where government touches most intimately the life of the people. In this period of national crisis, every activity of the nation must be geared to the highest standard of efficiency. Wars are won by morale as much as by armaments; and nothing is more important in the maintenance of morale than efficient administration of justice in the courts. And after the war is won, nothing will so strengthen democracy, in its contest with foreign ideologies, as efficiency in the discharge of this basic function of government.

Seven years ago, a great forward step was taken in this matter, when Congress adopted the Federal Rules Act. Under that statute, the lawyers of the United States have adopted a code of practice for the federal courts, which is pretty nearly ideal, a code so simple that any lawyer of ordinary intelligence can master its principles in a few hours, but withal so comprehensive that the most important litigation can be tried under it without difficulty. It has been in force now for three years, and it works so well that in the federal courts questions of procedure can be almost entirely dismissed from consideration and the time of court and counsel given to the merits of the controversy before them. In 1939, this great procedural act was followed by the Federal Administrative Office Act, which integrated and unified the federal judiciary and gave it large measure of self-regulation through judicial councils and conferences. These two measures have not only revolutionized the practice and procedure of the federal courts, but have furnished to the states models for their guidance.

And we must not forget that, important as are efficiency and dispatch in the federal courts, they are infinitely more important in the courts of the states. It is in the state courts that the great mass of ordinary civil litigation is tried. It is by the state courts that most of the criminal laws are enforced. And it is from the action of the state courts, rather than from that of the federal courts, that the efficiency of democracy in the all-important matter of administering justice is judged by the people at large.

With the thought that a more general use should be made of the knowledge acquired from the procedural studies made in connection with the formulation of the federal rules, as well as that the time was propitious for procedural improvement when the minds of the leading members of the profession were thus directed to the subject, the President of the American Bar Association in 1937, Mr. Vanderbilt, requested the Section

of Judicial Administration to appoint committees to make studies and formulate standards for the improvement of procedure throughout the country. His idea was that suggested procedural reforms of various kinds had already been fully tried here and there in various states and that, through study of these, proper committees could bring together into a code of standards, the best practices thus developed by our own experience. If in this way we could induce the states to accept from each other these improved practices, we would have enduring reform, based on solid experience and not on theory. Seven such committees were accordingly set up. They were composed of experts and were headed in every instance by a chairman nationally recognized as such. Each was given 49 advisory and consulting members, one from each state and the District of Columbia. They made reports which constitute a chart for the guidance of lawyers in any state who desire to improve the procedure of that state.[1] They are simple, they are comprehensive, they are scholarly, they are based on experience and common sense. They have received the indorsement, not only of the Section of Judicial Administration, but also of the Assembly and House of Delegates of the American Bar Association. Their advocacy has twice been made a special program of the Association by action of the House of Delegates.

Acting under the mandate of the House of Delegates at its last meeting that the advocacy of the standards contained in these reports be again made a special program of the Association this year, President Lashly appointed a special committee composed of the Chairman of the Section of Judicial Administration, the President of the National Association of Judicial Councils, the President of the American Judicature Society, and the Chairmen of the Sections of Criminal Law and Bar Organization. He appointed as Secretary of the Committee Mr. Paul DeWitt, one of the most efficient members of the Junior Bar, and I unhesitatingly ascribe to Mr. DeWitt a large measure of credit for the success of the Committee's work. The president asked me to act as Chairman because I had been Chairman of the Section of Judicial Administration at the time of the reports of the Committees; and I accepted the assignment with the labor it involves, because I consider the matter as being probably as serious and as important as any to which the American Bar Association has ever addressed itself.

In presenting the program of reform envisaged in the reports of the committees, I have narrowed it down to five principal points, and I believe that it can all be encompassed within these five points. They are: (1) To integrate the judiciary and give it proper powers of self-regulation through judicial councils and conferences, through proper machinery for assigning judicial man-power to the best advantage and through vesting the regulation of procedure in the courts themselves; (2) To improve the jury system, through better methods of jury selection, through restoring the common law power of the judge and through eliminating the general verdict in complicated cases; (3) to simplify trial practice after the pattern of the federal rules and to simplify the rules of evidence after the pattern of the model code of the American Law Institute; (4) to simplify appellate practice and eliminate the burden and expense either of narrating or of printing the record; and (5) to improve the procedure and methods of reviewing administrative agencies and tribunals so as to preserve in their procedure the principles of fair play and equal justice.

The attainment of the first of these objectives is of the first importance. If the judiciary of a state is unified and integrated,—if provision is made through judicial councils for systematic study of procedural problems and through judicial conferences for regular consideration of these by the members of the judiciary themselves, and if the judges are vested with adequate power for regulating the procedure of their courts, the problem of reforming procedure will almost take care of itself. It cannot be too strongly emphasized that the reform of procedure depends primarily upon the judges themselves. Councils and conferences will call their attention to reforms that are needed, and if they have the rule-making power, they can take the necessary action. I am happy to report that in almost every state in the union in which councils and conferences have not already been established and the rule-making power vested in the courts, action is under way which gives every promise of early success. I do not think it too much to hope that within the immediate future we shall see councils and conferences established and the rule-making power vested in the courts throughout the union, except perhaps in a mere handful of the least progressive states.

The second objective, the improvement of the jury system, I regard as one of prime importance, if trial by jury is to be preserved. I wish to make it clear that I believe in the jury system. For the great majority of cases, no better method for the trial of issues of fact could possibly be devised; and no more important bulwark exists for protecting the innocent from oppression at the hands of the powerful. I wish to preserve it; and, because I wish to preserve it, I wish to see something done to remove the defects which have almost destroyed the confidence of the general public in its integrity and reliability. There is no doubt in my mind that, if it is to be preserved, three things must be done: (1) we must provide methods of selection of jurors which will eliminate partisan and unfit jurors and will raise jury service in the esteem of the citizenship to the distinction of high and patriotic duty; (2) the general verdict must be abolished except in the simpler class of cases; (3) and the control of the judge over the trial as it existed at common law must be restored.

You do not hear complaints of jury trials in England or in the federal courts, where the judge exer-

1. See 63 American Bar Association Reports (1938) 517 et seq.

cises the power, which pertained to the judge at common law, and, I think that if you will take the trouble to inquire, you will find that it is precisely in those states which have made the function of a judge that of a mere moderator at a town meeting, that jury trials have fallen into the lowest repute. Throughout the country there is a rising realization that something will have to be done along this line, and already something is being done. The new rules just going into effect in Maryland, Texas and a number of other jurisdictions provide for a proper charge to the jury by the judge; and it is but a question of time until other states will take similar action. The logic of the situation demands it. The judge is the only disinterested lawyer connected with the trial. His only interest in a case tried before him is to see that justice is done. He is experienced in weighing evidence and is not easily imposed upon by appeals to passion and prejudice. In almost every jurisdiction he has the power to set aside the jury's verdict, if he deems it contrary to the weight of the evidence or against good conscience. Why anyone who desires that justice be done should object to his arraying the evidence and declaring and explaining the law applicable thereto, and thus aiding the jury to arrive at a correct verdict, is something that I have never been able to understand, and you can rest assured that the public does not understand it. I do not believe, as Mr. Justice Holmes once said, that "The man who wants a jury has a bad case";[2] but my observation has been that it is generally the man with a bad case who objects to the judge's assisting the jury to understand it.

The third objective, to simplify the rules of trial practice and the rules of evidence, is one which is coming very rapidly. Arizona and South Dakota have adopted the new federal rules almost in toto. Texas has adopted a simplified code based in large measure on the rules and Colorado has done a monumental work in adopting the federal rules with the same numbering, supplemented by such additional rules as are required by local conditions. In many other states features of the federal practice, such as discovery, pretrial, etc. are being adopted, so that throughout the country the trial of causes is becoming more business-like and the old "sporting" theory of justice is being abandoned.

There can be no doubt, I think, that the archaic procedure, with its time-wasting technicalities now prevailing in many states is doomed; and it is inevitable that these states will in the near future adopt a procedure more nearly in accord with the conditions of modern life. It is highly desirable that such procedure be modeled on the federal rules. There is absolutely no sense in having a different kind of procedure in the state and federal courts or in different sections of the country. Diversity makes for confusion and misunderstanding and accomplishes no good purpose. When a simple, expeditious system has been adopted by the federal courts for use throughout the country, I see no reason why the states should not adopt it and relieve the bar of the necessity of learning two systems of practice. The federal rules are the result of long study and the best efforts of the bench and bar of the entire country. It is possible, of course, that the lawyers of a single state might produce a better system for that state; but, to say the least, it is highly improbable that they will do so. Local pride or local inertia ought not be allowed to stand in the way of the accomplishment of so great a good as the attainment of a simple and unified procedure, which the general adoption of the federal rules would give us.

Important, also, is improvement in the rules of evidence. The technicalities of these rules have done more to bring the administration of the law into disrepute than probably any other single thing. The American Law Institute is doing a monumental work in embodying in a code the best thought of the profession on the law of evidence. That code will speed up and simplify trials more than anything I can think of. It will rid us of the hair-splitting and senseless technicalities which have brought ridicule upon the processes of justice. It ought to be adopted in every jurisdiction.

Do not misunderstand me. I attach no importance to rules of procedure and evidence, except as means of administering justice; and the trouble with having too many rules or with complicated or technical rules is that they hinder rather than help the court in attaining this end. The problem is to get rid of rules which bind and hamper the courts in their effort to do justice; and I favor the federal rules and the new code of evidence, not so much for what they contain, as for what they get rid of. They are entitled to our support because they are simple and elastic,—because they enable the court to go at once to the merits of the case before it without being hampered by useless procedural or evidentiary questions. Rules of procedure and evidence are the mere machinery of justice. The effort of the court should be directed to the doing of justice, not wasted in turning unnecessary wheels in the machine.

The fourth objective, the simplification of appellate practice, is coming slowly but surely. There is no sense in narrating the record, in filing bills of exceptions or assignments of error, or in printing the record on appeal. The case should be heard in the appellate court on the record made in the trial court, as has been done in England for more than half a century. Counsel should not be required to narrate or print the record, but should be permitted to print as an appendix to their briefs such parts of it as they desire the court to read. This saves expense to litigants and labor on the part of both court and counsel. It eliminates the most fertile sources of delay and leads to a better presentation and clearer understanding of the case. It is the practice in the Third and Fourth Circuits and the District of Columbia and in a number of the western and midwestern states. It

2. Holmes-Pollock Letters vol. 1 p. 74.

ought to be the practice everywhere.

The fifth objective relates to the practice of administrative agencies and tribunals. We might as well face the reality of the situation that these agencies serve an important purpose and that they are here to stay. The only way to preserve our free institutions from the collectivism which has overwhelmed so many of the nations of Europe is through governmental regulation of economic life. The courts cannot furnish this regulation. The legislature cannot furnish it. It can be furnished only by these administrative agencies, combining, as they do, certain legislative, executive and judicial powers. The problem is, not how to destroy them, but how to preserve in their processes the fundamental principles of fair play and due process, which lie at the very heart of our concept of free government. It is important that this problem be met in the domain of the national government. It is almost equally as important that it be met in the states, where administrative agencies are taking over an ever-increasingly large share of the responsibilities of government.

It remains to tell you something of how we are proceeding in our efforts to attain these objectives. In the first place, we have set up committees in each of the several states and the District of Columbia. These committees are coordinated with committees of the state bars and the President of the state bar association, in every instance, is named as a member. The members of the committees are outstanding judges, lawyers and law teachers interested in the subject of procedural reform; and the chairmen have been selected with special care. The fact that such men as Mr. Robert G. Dodge of Massachusetts, Mr. John G. Jackson of New York, Chief Justice Kephart of Pennsylvania, Judge Laurance M. Hyde of Missouri, Judge George Rossman of Oregon, and dozens of others no less distinguished, have been willing to serve as chairmen of these state committees is of itself a guaranty to the public of the importance of the movement.

Regional meetings of the Section of Bar Organization have been held throughout the country under the able leadership of Mr. Burt J. Thompson of Iowa; and at every one of these meetings the program of the committee has been given a place of prominence and has been presented by a representative of the committee.

Articles in advocacy of the Association's program have been published in the AMERICAN BAR ASSOCIATION JOURNAL and the Journal of the American Judicature Society. The leading newspapers of the country have supported it editorially. Monographs prepared by experts have been liberally distributed where they would do most good; and the various law reviews and state bar journals have been liberal in their support.

For the future, the committees should be continued and the work of education should go forward. My hope is that in the year to come the state committees will arrange for regional meetings to be held throughout each of the states so that the support of lawyers in the rural sections, who have much weight with the state legislatures, may be enlisted. It is not enough that the program be wise and that it commend itself to scholars and leaders of the bar. All the members of the bar and the public generally must be brought to see its importance. Where state legislatures may not be willing to take immediate action, the appointment of interim committees, as in Oregon, to make studies preceding the meeting of future legislatures will pave the way for success.

Let me conclude by saying that the work of the year has demonstrated that the program of the Association is one which commends itself to the bench and bar of the country, definite progress towards its adoption has been made, and in my opinion its ultimate success is assured. The program is, of course, no one-year program; but time is not of the essence so long as success is attained. And success will be attained for two reasons. The bar is realizing that it can hold in the life of the future the important place that it has held in the life of the past only if it keeps step with the times and goes about its business in a businesslike way. Patriots in all walks of life realize that, if democracy is to survive, democracy must be efficient; and nowhere is efficiency more important than in the processes of justice.

COMMENT TO THE JURY BY THE TRIAL JUDGE

By HON. MERRILL E. OTIS

United States District Judge, Western District of Missouri

MR. President and Gentlemen: Some part of my discussion of the subject which has been assigned me is in the footnotes in my manuscript, which I have not now time to read and you have not now time to hear. If the papers prepared for this program are printed, they, including their footnotes, may be studied. Then they really may prove of value to men charged with the duty of improving the administration of justice in the courts or with the even greater duty of preserving the courts and their historic powers from the onslaughts of demagogues. What I shall say in this address, limited in time, can be only a brief summation of the argument.

My subject was put in words by Judge Parker. (I

digress to say that no man in the history of the Republic has contributed more than has he to the cause of greater efficiency in the administration of justice in the courts.) Judge Parker formulated for me the subject as it is announced on the program – "Comment to the Jury by the Trial Judge." I am sure he did not have in mind a discussion confined to an inquiry so narrow as: Should the judge in his charge be allowed to express his views as to how questions of fact should be resolved? What Judge Parker had in mind was – certainly it is to the broader subject I shall speak – Shall the charge to the jury as known to the common law and in the practice of the national courts be circumscribed by legislation or otherwise so that the part played by the judge in the trial of a case shall be reduced to the minimum? In those states – and there are some such – in which the judge is gagged, handcuffed, blindfolded and paralyzed by statute from the waist up, the same question may be put in opposite form: Shall the part played by the judge in the trial of a case be returned to what it was at common law?

A Live Subject

The subject is a live subject. Scarcely a session of Congress comes and goes but a bill is introduced to emasculate the functions of the federal judges. Senator Caraway, the First, in his lifetime, let no session end without at least one assault on the power of the district judge to charge the jury as of old. A bill which he fathered passed the Senate. More recently the same sort of bill was recommended by the great judiciary committee of the House of Representatives. It passed the House.[1] The purpose of each of these proposals was to hamstring the trial judge in his relations with the jury, to reduce his powers in that regard to the level of the powers of a trial judge in the most backward and reactionary state. There is no lower level. It is a live subject also when state practices are under consideration. Originally the judges in the states had common law powers. Those powers were swept away – along with much that may have been really evil – in the undiscriminating flood of the Jacksonian Revolution. Now, in some of the states, movements are under way – in a few already they have succeeded – to restore to the judges their former powers.

What were the characteristics of the charge to the jury in common law trials, characteristics preserved in our federal system? What were they and what are they? They were and they are nine. 1. The charge is delivered by the judge *after*, not *before*, the arguments of counsel. 2. The charge is oral, not written. 3. The charge is in the language of the judge, not that of the lawyers. 4. The voice in which the charge is delivered – the emphasis, the intonation – is the voice of the judge, not the voice of the advocate; the accompanying gesture is the gesture of the judge. 5. The judge may – usually he does – describe in the charge the separate functions of judge and jury; the judge may – usually he does – admonish the jury that the jury and the judge are performing solemn and sacred duties, that each juror also is a judge serving in the temple of justice, an admonition which at least tends to raise even the humblest to a purer, nobler plane. 6. The charge presents the applicable principles of law, not as abstract propositions couched in legal terminology, but as rules related to the particular issues involved in the case on trial. 7. The charge sets out what are the really controverted issues of fact and – of equal importance – what are not really controverted issues. 8. The judge may – sometimes he does – review and summarize the evidence. 9. The judge may – almost never he does – give his opinion touching the credibility of a particular witness; the judge may – almost never he does – express his opinion as to how some particular issue of fact should be decided . . . It is this last characteristic, No. 9, this power which rarely is exercised, which one, taking a narrow view, might speak of as "comment on the evidence." Because of what some men say is the vice of this one characteristic they would destroy the whole structure. One is inclined to believe, sometimes, that it is not the one alleged defective spot which is aimed at; one is inclined to believe that the true desire is to destroy the whole structure.

Comment in the Narrow Sense

Let us examine at once this principal point of attack in the ancient edifice. Is it vulnerable at that point? Is there justification for the contention that the judge, who has heard all the evidence in a case, should not comment, that, to be more explicit, he should not express an opinion as to how some disputed fact issue should be resolved? To make the question still more clear by illustration, is there justification for the contention that in a suit for damages for personal injuries in which one of the questions is: *What were the injuries?* and in which the medical testimony has been involved and contradictory and much of it in language as intelligible to laymen as ancient Greek, the judge should not give the jury the benefit of his views, should not say, "Gentlemen, my opinion is not binding on you,

1. The bill which passed the House June 21, 1938, read as follows:

> Be It Enacted by the Senate and House of Representatives in the United States of America in Congress assembled that upon the trial of any case, civil or criminal, before a jury in any district court of continental United States, or in any federal court of continental United States authorized to try cases with the aid of a jury, the form, manner and time of giving and granting instructions shall be governed by the law and practice in the state courts of the state in which such trial may be had, and the judge shall make no comment upon the weight, sufficiency or credibility of the evidence or any part thereof, or upon the character, appearance, demeanor or credibility of any witness or party except as such comment is authorized in trials of such cases by the law and practice in the state courts of the state where such trial is had.

The purpose and effect of the bill were not disclosed in its text but are apparent to any who studies it carefully with knowledge of what is the law and practice in most of the states.

but my judgment is *the plaintiff's cancer was not caused by trauma*"? As I have said, the expression of an opinion by the judge as to a fact issue is as rare as a blonde in Central Africa – the justification for that statement is set out in a footnote.[2] But why should the judge not say: "Gentlemen, my opinion is not binding on you, but my judgment is the plaintiff's cancer was not caused by trauma"? Why should he not say that? Let us consider the principle involved as presented in this concrete illustration.

The juries I have seen in federal courts have been made up of intelligent men. Every jury should and can be made up of intelligent men. I assume such a jury. The argument I am now making would have greater force, if I assumed a jury of ignorant men. But I assume a jury of intelligent men. I assume, however, a jury of laymen none of whom probably has witnessed, even as a spectator, more than a half dozen trials in the course of his life. Not one of the jury perhaps ever has participated as a juror in any other case in which an important issue turned on the testimony of experts . . . And I assume a judge, an educated man, a man of experience at the bar and on the bench, who has participated in hundreds, if not thousands, of trials, who has heard experts testify by the score and who has at least some acquaintance with the unknown tongues they speak. I assume a judge who is unbiased, unprejudiced, ever conscious of duty. I assume such a judge. If I cannot make that assumption, what an indictment of our judicial systems the fact is. With such assumptions in mind touching the judge and the jury, I assert it is beyond the possibility of reasonable controversy that the opinion of the judge as to what experts are most qualified and as to what testimony of experts comes nearest the truth is superior in accuracy to the opinions of members of the jury, unaided by the advice of the judge. None, I think, will disagree. But still a multitude will assert that something is rotten in the state of Denmark if the judge is permitted to say: "Gentlemen of the jury, my opinion is not binding upon you, but my judgment is, the plaintiff's cancer was not caused by trauma". They view with alarm. Why do they view with alarm?

They say – it is not a jury trial if the judge comments on the evidence. I wrote to 150 Missouri lawyers, trained in the Missouri system, for their thought on this matter. In the letters opposing comment, this sentence was used again and again: "Any comment by the court on the evidence invades the province of the jury". One lawyer, with charming frankness, put it: "The judge who advises the jury as to the facts invades the province of counsel". But nine out of ten who opposed comment, wholly as a matter of abstract principle it seemed, were concerned with preserving the trial by jury as guaranteed by the Constitution and the Bill of Rights. They thought comment by the judge impinged on the historic function of the jury. One lawyer expressed the thought in these words: "The judge has no more right to invade the province of the jury than has the jury to invade the province of the judge."

The answer to this contention – this one contention which is put in words – occurs to all of you at once. They who make this contention have not read the history of our legal institutions or, if they have read it, they have shut their eyes to essential parts. The historic jury trial, the jury trial which was guaranteed by the Constitution and the Bill of Rights, that jury trial – the Supreme Court of the United States has said it again and again – "is a trial by twelve men, presided over by a judge empowered to instruct them as to the law and to advise them as to the facts."[3] The real foes of the jury trial are not those who would preserve the respective functions of judge and jury, but those who would alter them. The impartial observer will clarify his thinking if he can keep in mind the fact that the jury never was invented as a tribunal designed to be independent of all guidance. It was to have the guidance of lawyers, biased and interested lawyers, it was to have the aid of the judge, an unbiased, disinterested judge. So aided, it was believed, the jury, generally, would reach just results.

Contempt for Jurors

The men who most oppose comment by the judge for that they would preserve, they say, the independence of the jury, unintentionally betray an amazing contempt for the jury which they pretend to exalt. The jury, they imply, is made up of weaklings, who will yield their views and their convictions to what is said by the judge contrary to their views and their convictions. They have no backbone, no character. If, in the illustrative case I have employed, the jury was convinced the plaintiff's cancer was caused by trauma and that his damages should be $10,000, the judge's intimation of his opposite conviction will overcome them, although their judgment remains the same, and they will return a verdict for only $500.00. For jurors, you must know, are worms. They must be shielded from the light of the judge's views, although they must continue to be exposed to the advocate's every art, legitimate and illegitimate, and if by any chance the advocate is a pettifogger, then to his every device and wile as well.

Are jurors such nincompoops? For sixteen years I have been working intimately with jurors. My respect for federal court jurors was great in the beginning. It has grown greater as the years have passed. I have participated with jurors in the trials of hundreds of cases, criminal and civil cases. My testimony, bottomed on the experience of sixteen years, is this: The judge's

2. In 1937 I addressed a letter to every federal trial judge in the United States making inquiry as to the practice of expressing opinions on controverted fact issues in charges to juries. I received seventy replies. They were unanimous to the effect that only in the most rare case was such an opinion given to the jury.

3. Patton v. U. S., 281 U. S. 276, 288.

opinion as to how an issue of fact should be decided, unless that opinion satisfies and convinces the reason and judgment of the jury, is as ineffective on the result as falling dew is ineffective on Gibraltar. And I think my testimony would be the testimony of every judge. Only the other day I read an opinion written by the Honorable Learned B. Hand, the distinguished Senior Judge of the Second Circuit, who for several years was a trial judge, and I do not need to say to those who know him, he is a man of forceful personality. Said Judge Hand: "The belief . . . that a jury is excessively subject to the judge's influence my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine."[4] Long ago Chief Justice Taney, speaking of the same matter, said — "An objection of that kind (that comment by the court has an undue and improper influence on the minds and judgment of jurors) questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it in questions of fact."[5] Mr. Justice Holmes had this to say to critics of the federal system of charging juries: "Universal distrust creates universal incompetence."[6] It is a text provocative of thought.

Yes, "Universal distrust creates universal incompetence." Take away from the judge, one by one, the powers with which he was invested of old. Will you be proud of the figurehead which remains? Make the trial judge, not "the governor of the trial," as the Supreme Court has said he should be,[7] but a mere moderator, timid, self-effacing, fearful lest he cast a shadow, with no discretion except to decide, as Dean Pound put it once, "on what peg he shall hang his hat."[8] Such a course will create incompetence on the bench. Assume that jurors are jelly fish and you do much to convert them into jelly fish. Assume that jurors will heel like dogs at the mere gesture of the judge and you do not contribute to their sense of manhood. "Universal distrust creates universal incompetence." If judges are incompetent, is not the remedy to get judges who are competent? If jurors are not men, is not the remedy to establish and to enforce higher standards for jury service? But, try to raise the standards of eligibility for jury service. The same individuals will oppose that who oppose any advice to the jury from the bench. Is it just barely possible that the same men who think they would profit from low grade jurors, think also they would profit still more if low grade jurors have no high grade aid and advice? Perhaps that Missouri lawyer had something who wrote: "The judge should be an impartial umpire, merely calling 'sustained' and 'overruled' as the umpire at the game would call 'balls' or 'strikes'. A poor man with a third grade lawyer ought to lose if the other man with a first rate lawyer can out-try him."

Lawyers Comment

By the way, has it ever been suggested that lawyers should not comment on the evidence in trials in which they are engaged? They do comment, do they not? They review the testimony, they sum up the evidence, they discuss the credibility of witnesses, they give their opinions freely and emphatically to the jury. They are partisan, interested, biased, hired by one side or the other. It often happens that the lawyer for the plaintiff is a pygmy or a giant, that the lawyer for the defendant is a giant or a pygmy. Often the contest is between a heavy weight and a feather weight, unequal by reason of circumstances with which Justice has had nothing to do. But none would suggest that lawyers should be forbidden to comment. The argument of counsel is an inherent, necessary, useful part of the historic jury trial, just as the judge's advice as to the facts is an inherent part of the historic jury trial.

There are others besides counsel who comment on the evidence in the trial of every case. There are strong men on the jury — there ought to be — and others not so strong. On every jury there are leaders and there are followers. When the jury retires an argument begins which may last for hours, may last for days. Juror *X* becomes, almost at once, Plaintiff's champion and Juror *Y* becomes, almost at once, Defendant's champion. *X* and *Y*, and half a dozen others also, comment on the evidence and witnesses to their hearts' content. They go far beyond the evidence in their comment. They drag in everything under the sun, including the religion, race, color and previous condition of the parties. One juror speaks of his preference for the red hair of plaintiff's counsel over the bald head of defendant's advocate. Another recalls that the defendant's great-grandfather was a disciple of Brigham Young. Who would interfere with that freedom of comment and discussion? All of it is an essential part of the historic jury trial, just as the advice of the judge as to the facts, designed as the presentment of an impartial view after the jury just has listened to the biased arguments of lawyers, also is an essential part of the historic jury trial.

Potential Usefulness

The power to comment, in the narrow sense, seldom is exercised. Seldom is there occasion for its exercise. Shall one say, then: "Well, if the power is seldom exercised, little change will be effected if it is struck down."? Let us think about that. How will it be struck down? Do you answer: "Why, by an act of Congress providing — 'In the trial of a case no judge

4. U. S. v. Goldstein, 120 F. (2d) 485, 491.
5. Mitchell v. Harmony, 13 How. 115.
6. Graham v. U. S., 231 U. S. 474, 480.
7. Quercia v. U. S., 289 U. S. 466, 469.
8. Address to Missouri Bar Association, September 30, 1927.

shall give his opinion as to how any fact issue shall be decided'."? Do you not perceive that such a limitation speedily will be interpreted to include everything in the charge beyond a bare recitation in colorless and technical language of abstract principles of law? Any review of the testimony, any indication of what are the real issues and what are not, any application of rules of law to the facts of the case, will be denounced as involving unlawful comment. Where state laws forbid comment, the most trifling expression of the judge, although made unconsciously or made by the way, is seized upon and characterized as an invasion of the jury's exclusive province.

The power to comment, even if it is not used in nine cases out of ten, plays a significant part in every trial. "He also serves," said Milton, "who only stands and waits." A power, not exercised, yet may exercise a potent force. The occasion may be rare when it is necessary to enforce the penalty of some criminal statute against an offender, but the restraining force in society of that criminal statute always exerts its power. Similarly the great value of the right to comment lies in its restraining effect even when it is not exercised. The pettifogger oft puts aside his wonted ways, fearful that if he should throw a smoke screen about the jury box it will be blown away by the judge's charge.

In the Broader View

In the narrow sense, we mean by comment the expression of opinion as to how some issue of fact should be resolved. In a larger sense almost the whole of the charge to the jury is comment. A mere review of the testimony, unless the whole transcript is read, involves selection and rejection, involves analysis and synthesis, involves, in short, comment by the judge. Suggesting what are the real issues and what false issues have been dragged in, so greatly aiding the jury to a fair and intelligent result, even framing special questions to be answered, all is comment, not on the evidence indeed as such, but on the case. Reminding the jury that the judge and jury are engaged in the solemn performance of the greatest of human duties, the doing of justice between government and citizen, between man and man, that too is comment on the case, forceful and effectice comment. "Go out now," said the late Judge Cant of Minnesota, concluding his charge to the jury, "Go out now and do justice by your verdict." "We except," said counsel for the plaintiff, "to the court's remarks." What that advocate had in mind was his objection to anything that might lessen the force of his own effective, but completely partisan, art and eloquence. Elihu Root called the turn when, addressing the American Bar Association in 1916, he said: "Why is it that (in some of the states) by statutory provisions the only advice, the only clarifying opinion and explanation regarding the facts which stand any possible chance to be unprejudiced and fair in the trial of a case is excluded from the hearing of the jury?" He answered his own question: "It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game."[9]

It has not yet been suggested that the judge should not charge the jury upon the law. Why not that suggestion? The law also sometimes interferes with the desire to win at any cost in what Elihu Root called the "sporting contest." Still that bald suggestion is not heard. The thought is perhaps that, if the declaration of law is sufficiently abstract, its application to the facts may not be perceived by an unaided jury. Moreover, it will be said, here error may be reviewed and corrected. But the comment on the facts also is circumscribed and hedged about as closely as comment on the law. Consider the limitations asserted and enforced over and over again by the federal appellate courts. These are the limitations: 1. Any reference to the facts must be accompanied always with the most clear and unequivocal declaration that what is said is not binding on the jury. 2. Any reference to the facts by the judge must be impartial, not one-sided, must be presented in a judicial manner, must not be argumentative, must not even tend to be coercive. The federal apellate courts enforce these limitations.[10]

A few years ago the thought occurred to me that a statistical study might throw real light on the problem now considered. Has the power of comment been abused, have the limitations on that power been disregarded? I took a ten year period, July 1, 1924, to July 1, 1934. In that period I discovered there were tried to juries in federal courts 82,485 criminal cases. In that period there were 82,485 charges to juries by judges. In the same period there were appeals in 3,203 cases. Of the 3,203 appeals, in only 76 cases was it even suggested by exception taken that the charge of the judge, in its reference to the facts, in any way exceeded the limitations imposed by law on the exercise of that function. In only 28 cases out of 3,203 appealed was the judgment reversed because the judge's comment on the facts was unfair, not impartial, was argumentative, because it tended to coerce or was not accompanied with the clearest advice that the comment was not binding. Twenty-eight cases! Less than 3 cases a year of all the criminal cases tried in the whole of the United States! In the same period of time of approximately 80,000 civil cases tried to jury, with 1,645 appeals in only 11 cases, did appellate courts say the charge in its reference to the facts was unfair, not impartial, argumentative, that it even tended to be coercive. Eleven cases! Twenty-eight plus 11 is 39. One hundred and sixty thousand jury charges in ten years. Thirty-

9. Address (1916) before American Bar Association.

10. Representative criminal cases are: 43 F. (2d) 288, 48 F. (2d) 482, 57 F. (2d) 90, 62 F. (2d) 746, 71 F. (2d) 85, 72 F. (2d) 589. Representative civil cases are: 36 F. (2d) 926, 36 F. (2d) 936, 41 F. (2d) 508, 46 F. (2d) 399, 68 F. (2d) 234, 68 F. (2d) 83.

nine reversals. Thirty-nine errors in 160,000 chances for error! The angels in Heaven do not have so good a record.

A Mere Sporting Contest

The fact is, gentlemen, the throttling long ago of the trial judge in so many of the states (happily a contrary tendency now is manifest) proceeded, and the ever recurring efforts to gag the federal trial judges proceed, not from any genuine belief that powers were or are abused, not from any sincere conception that stalwart American jurors are morons so miserable they will return verdicts against their consciences and judgments because they have been advised as to the facts by the judges. Men may say those things, few believe those things. Let us be frank about the matter, even if our language is not the language of the diplomat. Let us call a spade a spade, a pettifogger a pettifogger, a demagogue a demagogue. I am willing so to do. Still I think I cannot use stronger language than that I just now quoted from Elihu Root. The motive of them, said he, who would exclude from the hearing of the jury "the only clarifying opinion and explanation regarding the facts which stand any possible chance to be unprejudiced and fair," their motive is, he said— ". . . to make litigation a mere sporting contest between lawyers." A mere sporting contest! How avoid a prostitution so shameful? One way to avoid it is to call for jury service only individuals of fine character and high intelligence. Another way to avoid it is to deal with jurors as if they were men, not worms. "The jury," said William Howard Taft, "are the ultimate judges of the facts. But the judge is there and *it should be* his duty, with his experience, to help the jury to consider and to analyze the evidence and to weigh it with common sense."[11]

11. Address before the American Law Institute, June 15, 1930.

HOW TO ACHIEVE IMPROVEMENT IN THE ADMINISTRATION OF JUSTICE

By GEORGE ROSSMAN
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LAW has always been a progressive science.

Originally no one believed that man could make law. All assumed that the origin of law was in the supernatural power. Over the inscription of Hammurabi's Code upon a diorite pillar in Babylon, where it can be read even today, is a representation of the sun god handing to the King of Babylon the laws for the government of his people. Thus was indicated the belief prevalent at that time that law originated in the Supreme Being.

Hammurabi and Moses were not regarded by the people of their times as lawmakers, but as mediums through whom the law had been revealed to man.

Eventually Athens came to see that man could make law. Through the assembly of her citizens Athens made laws. Rome improved upon that method. It made laws through the representatives of the citizens and later Rome developed another means: the Roman praetor proclaimed the legal principles under which he would grant justice and the forms which he would employ. Thus more than two thousand years ago, we have the exercise of the Rule-Making Power. The Normans brought trial by inquest to England, and the genius of the Anglo-Saxon eventually converted trial by inquest into trial by jury.

The love of liberty and a desire to have freedom from untoward exercise of governmental powers caused the people of America to develop another great legal principle — constitutional law.

Without further review of the history of jurisprudence, we can surely say that the law has always been a progressive science.

This meeting is concerned with methods available for a further improvement of our law; especially our procedural law.[1] A review of some efforts at improvement made in the past will disclose methods.

In 1776, after Blackstone had published his Commentaries and was receiving warmhearted praise, there appeared a book, anonymously published, entitled A Fragment on Government. It criticized the Commentaries and held that Blackstone's fundamental error was an antipathy to reform.[2]

This volume displayed such a comprehensive knowledge of the fundamentals of the common law that it was assumed that none but one of the great jurists of the time could have been its author. It was variously attributed to Lords Camden, Ashburton and Mansfield. But when its author was discovered it was seen that he

1. Hall, The Selection, Tenure and Retirement of Judges, 3 J. Am. Jud. Soc. 37: "We find that existing defects in the operation of our courts are referable to one or the other of four groups of causes relating (1) to the choice of judges; (2) to the organization of courts; (3) to modes of court procedure; (4) and to the constitution of the bar."

2. A Fragment on Government, Preface, p. iii.

was a very young attorney—Jeremy Bentham. This book launched Bentham upon his long and brilliant career as a critic, reformer and codifier of the law.

When Edward Livingston visited England he became acquainted with Bentham, who interested him in codification. Later Livingston, while temporarily sojourning in his native New York, published his highly esteemed code. It was after that visit that David Dudley Field wrote his code.[3] And his code has exerted a powerful influence upon the law of pleading.

From this brief narrative we see that there goes forth from a lawyer with practical ideas for the improvement of the law concentric waves of influence like expanding circles upon a pool of water.

Bentham's book appeared in 1776. At the time of its appearance Bentham was the only critic of the English common law. His was a voice crying out alone in a wilderness. But in a few years his criticism of English judicial procedure began to win converts. Other critics appeared and joined in the attack. They were laymen, editors. Thus was begun the great struggle which lasted for a century and which finally culminated in the enactment of the Judicature Act. Professor Sunderland in his account has vividly described that great campaign.[4] The lawyers at first fought back bitterly, but later, when it became evident that this campaign, conducted as it was by laymen, was sure to win results, the lawyers joined in the reform movement and wrote the curative legislation.

The fact that the leadership in that campaign which produced the Judicature Act came from the laymen, and the further fact that in some other struggles for reform in which the bar took the leadership the efforts were fruitless, have caused some commentators to berate the capacity of lawyers for the reform of the law. Let us take brief note of two campaigns.

In 1927 a committee of distinguished judges, lawyers and law school instructors, acting upon the prompting of the Commonwealth Fund, brought forth five comprehensive proposals for the improvement of the Law of Evidence. Each proposal was accompanied with data, facts and supporting comment. The material was published in a volume of one hundred and twenty pages.[5] After the committee had published the volume it made no campaign in support of its measures, but, to the contrary, ceased its activities. The reformers depended upon merit alone. Scant results came from their effort.[6]

In 1929 a reform movement was begun by the Committee on Law Reform of the Association of the Bar of the City of New York. The committee's report[7] indicates the careful, intelligent attention which it gave to the task in hand. But reading on we observe that it met with complete failure with the measures which it presented to the 1929 legislative assembly for enactment. Members of the legislature accepted the committee's bills, but none of the bills was given a legislative hearing and none was reported out of legislative committee. After this failure the committee made a careful study of the rules governing pleading, practice and evidence which developed forty-four proposals for the improvement of the laws governing procedure. Many of these proposals were based upon laws in successful operation in other jurisdictions. The committee secured wide publication of its proposals and sent copies of its program to a selected list of attorneys. It expressly invited criticism, comment and suggestion. But its 1931 report[8] manifests the chagrin which the committee experienced when less than fifty replies were received as a result of its extensive efforts to enlist interest in its program. The committee, however, refused to become discouraged. It felt that if it could secure co-operation upon a program of reform by all bar associations in the state it could still hope to secure enactment into law of its program. Accordingly, it put forth industrious efforts to bring about co-operation of all bar associations within the state. We now turn to the 1932 Year Book of the Association[9] and observe that the Law Reform Committee was ultimately compelled to abandon hope of securing bar association co-operation, and with this final frustration of its plans ceased agitation of its program. In this manner a reform effort conducted in a lawyer-like manner ended unsuccessfully.[10]

Many commentators, after reviewing these and other campaigns conducted by members of our profession, declare the lawyers, unless assisted by laymen, cannot maintain successful campaigns. They dwell upon the conservatism of the bar and find inertia in the profession. They declare that lawyers are hostile to reform and manifest snug contentment with any existing procedure[11] regardless of its defects.

But the mere fact that lawyers conducted this or that campaign which yielded no result does not necessarily indicate that the lawyer is by nature a failure as a reformer when unassisted by the layman. Rather, a study of these unsuccessful campaigns indicates generally that the lawyers failed because they made the mistake of assuming that a meritorious bill was bound to win its way through the legislature.

But merit alone is rarely sufficient. It seldom suffices for the enactment of any kind of a law. Today we talk about clamor groups, pressure groups, must legislation and the legislative counselor. Whether we approve

3. Glenn, 7 Fla. L. J. 274. Hicks, Men and Books Famous in the Law, 159.
4. Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725. Sunderland, Hundred Years' War for Legal Reform in England, XV, The Concensus 8.
5. The Law of Evidence, Some Proposals for Its Reform.
6. For a review written in part by one of the committee members, which describes the effort at reform and lists its legislative yield, see Morgan and Maguire, Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909.
7. A. B. C. N. Y. Year Book (1930) 234.
8. A. B. C. N. Y. Year Book (1931) 236.
9. A. B. C. N. Y. Year Book (1932) 226.
10. For an account of the accomplishments of a later New York committee on legal reform, see Brown, Lawyers and the Promotion of Justice 232.

of such methods or condemn them, we nevertheless must recognize that merit rarely suffices.[12]

In legislation, as in all other of man's activities, the human element plays its part. The personality of the proponent of the bill, his point of view, and the manner in which he portrays its likely effect are highly important.

Dealers in building supplies who desire the benefit of a lien statute, groups interested in securing pensions, others who advocate rate and utility legislation do not depend upon merit alone.

The legislator naturally wants to know whether the public favors the measure which he is asked to support, and it is proper for its proponents to urge the public to express itself. In fact, some such effort is necessary to take the proponents' bill out of the mass of legislation which crowds itself upon every legislator.

Very likely if the group of lawyers, judges and scholars which acted upon the request of the Commonwealth Fund in writing the aforementioned proposals for the improvement of the law of evidence had not disbanded after they had written their program, but had urged legislative action, a large measure of success would have been achieved.[13]

It is easy to compile a list of successful campaigns initiated by the legal profession and carried through to a successful conclusion by it.

Before glancing at the list, let us take note of the fact that the lawyer of today has received from his law school not only a working knowledge of law such as the lawyer of a generation ago obtained, but he has been schooled somewhat in the philosophy of the law and has been shown what its principles should be. The university law school – generally equipped for research – has made great strides since the twentieth century began and is rapidly supplanting methods of legal training that were previously employed.[14] Today we see that jurisprudence is not a separate, independent science, but is only a division of the great social science which promotes human welfare. In short, the lawyer of today is better equipped to lead in law reform than the lawyer of previous times. More than one competent observer has commented upon the improved outlook of the profession.[15] The lawyer of the type who says, "When a case reaches its merit, I lose interest in it" is beginning to vanish.

Everywhere we see evidence of the lawyer's efforts to improve our law. We have a hundred law reviews which are published with regularity. Almost every issue of these reviews carries one or more articles that argue on behalf of reform.[16]

The Journal of the American Bar Association never fails to speak out in favor of improvement, and the Journal of the American Judicature Society is a powerful voice in behalf of reform. The National Conference

11. A. B. C. N. Y. Year Book (1930) 234: "The efforts of bar associations in this state to reform the law are therefore largely futile. Year after year their committees spend a great deal of time and effort formulating bills providing for changes in the law, some of which it may be assumed are not without merit. Most of those bills sleep peacefully in legislative committees. • • • Bar associations are at least partly responsible for the fate of their bills. Too often they content themselves with causing them to be introduced and fail to take the subsequent steps necessary to obtain their adequate consideration by the legislative committees to which they are referred, and, if they are reported out of committee, their passage," Proskauer, A New Professional Psychology Essential for Law Reform, 14 A. B. A. Jour. 121: "We must, none the less, realize that our natural conservatism is today unduly retarding the accomplishment of essential reforms." Clark, Methods of Legal Reform, 36 W. Va. L. Q. 106: "The criticism which I am here making of the rank and file of the bar—not I hope you will notice of the leaders of the profession—is, I believe, amply merited. No group is more backward in putting its own house in order." Dayton, 10 The Panel 25: "And here is one point where the layman's responsibility is very evident. Why should the legislature listen to a few lawyers if their demands for reform are not supported by the public? • • • Is the reform of general public benefit? So its proponents assert, but if this is the fact, why is not the public present through its civic and business organizations, showing its interest and making its own demand?"

12. Dayton, Responsibility of Laymen for Law Reform, 10 The Panel 25, quotes the following statement issued by the New York State Chamber of Commerce in May, 1930: "Statutes do not pass a legislature on their merits alone. They do not pass because lawyers say that such statutes are desirable. They pass when there is a widespread and insistent public demand for their enactment. • • •" Tracy, What Progress in Reform of Evidence Rules?, 20 J. Am. Jud. Soc. 80: "Is this not one example out of many where important research work has been done, the results have been duly published, and nothing further has been done to make effective use of the results of such research, the idea being that if the work of the committee was worth while the general public would always read its report and proceed to act upon it?" Dayton, A Program for Legal Reform in the United States, XVI The Concensus 3: "However regrettable it may be, it is the fact that legislation is not adopted on its merits alone. There is too great a competition for legislative attention. There are too many statutes of great public moment to be considered at each legislative session. There are too many political bills of more immediate and direct interest to the legislators. Reform legislation can be effected only by active and insistent demand on the part of those who are interested."

13. Tracy, What Progress in Reform of Evidence Rules?, 20 J. Am. Jud. Soc. 80, in commenting upon the scanty legislative yield resulting from the committee's efforts, says: "Another, and more constructive, question which comes to the mind of the writer is whether more practical results could have been accomplished by the committee if its work had been differently handled. In asking this question no criticism is intended to be made of the statutes which the committee drafted or of the fact that they limited themselves to these five specific reforms, but the question is directed at the fact that the committee, having made its report, ceased its labors and nothing was done to see that its recommendations were pushed for general adoption in the various states."

14. Brown, Lawyers and the Promotion of Justice 31; Smith, Law Reform, 1931-1932 Year Book N. J. S. B. A. 111; Vanderbilt, University Legal Education and the American Bar, 24 A. B. A. Jour. 105.

15. Holmes, Book Notices, Uncollected Letters, Papers 41: "Now, reformers and conservatives seem to agree in the desire to deal philosophically with the questions of jurisprudence. • • • Whatever may be the merit of particular opinions, there is an atmosphere in which great results are possible; in which originality is not suffocated at its birth." Vanderbilt, The Function of Bar Organizations in the Improvement of Judicial Administration, 22 J. Am. Jud. Soc. 117: "In the last analysis most of them are the result of inertia rather than a positive antipathy, but if I read the signs of the times correctly, a change is coming over the profession in this respect." Wigmore on Evidence (3d ed.) § 8b: "Professional opinion is more ready for them than most persons would assume. A clear proof of this is that the specific improvements proposed in the foregoing Report were adopted and recommended in most instances with virtual unanimity by a committee representing veteran practitioners." Brown, Lawyers and the Promotion of Justice 223: "Finally, there is a growing appreciation among members of the bar, which must be noted, of its professional responsibility for improving the administration of justice."

16. Grinnell, A Judicial Tradition that Encourages Ignorance, 25 J. Am. Jud. Soc. 10, reverts to Wigmore's (Wigmore on Evidence (3d ed.) § 8a) deprecation of the blindness of the profession to the merits of the law reviews. Each of the seven offices of the members of the Oregon Supreme Court is supplied with the indexes to the law reviews.

of Judicial Councils is publishing a series of volumes which illustrate by citation the successful administration of the civil, criminal and appellate law.[17]

Let us review briefly some actual instances showing what the profession has accomplished in practical legal reform.[18]

The American Bar Association, under the leadership of the late Thomas W. Shelton of Virginia, and the American Judicature Society, under the effective influence of its secretary-editor, Herbert Harley, persuaded Congress in 1934[19] to enact the measure which recognized in the United States Supreme Court the rule-making power for the federal courts. Here was a reform of major magnitude won by the legal profession.

In 1929 the Chicago Bar Association decided that the time had come when the antiquated practice of Illinois should be supplanted with procedure suitable to the needs of today. A committee of that organization, headed by Harry M. Gottlieb, assumed charge of the movement. It enlisted the aid of Professor Sunderland and shortly a measure was drafted. Then the Illinois Bar Association, under the brilliant leadership of Judge Floyd E. Thompson, took up the cudgels. In 1933 victory was won by the enactment of the Practice Act which is now in use in that state.[20] Here was another victory of major proportions won by the bar acting alone.[21]

In 1929 another major victory was won by the legal profession. It consisted of the enactment by the Ohio legislature of a measure which created the Cleveland Jury System. The plan was originated by the Cleveland Bar Association and the Common Pleas Court. Mr. Newton D. Baker of the Cleveland bar, who was then president of the American Judicature Society, was the leader of the campaign.[22]

The National Conference of Commissioners on Uniform State Laws is composed exclusively of members of our profession. That organization has written in excess of sixty measures for the improvement of our law. Every state has adopted at least one of those measures, and one of the acts has been enacted into law by all of the states. Thus, this organization has maintained effective relationship with the legislatures of every state. If we pause for a moment and think it will occur to our minds that had it not been for the fact that the Uniform Negotiable Instruments Act has been adopted by every one of the fifty-three American jurisdictions, and had it not been for comparable success by the commissioners with others of their commercial measures, a demand would have been voiced long ago for an expansion of, or an amendment to, our federal constitution giving the congress power to enact that form of legislation.[23]

The American Law Institute is another organization composed exclusively of members of the bench and bar. It is doing for the American common law what Justinian did for the Roman law, and what the Code Napoleon did for the law of France.[24] This organization, in restating our common law, and in thereby removing doubt and complexity, is averting demands for legislation which surely would have been made had the American common law remained in the condition in which it was when the Institute was organized.

Our Judicial Councils, consisting largely as they do of members of the legal profession, have a long list of achievements to their credit.[25]

I shall bring to a close this review of successful bar activities by turning to a summary of improvements to our law effected by bar associations[26] compiled in 1938 by Mr. Arthur T. Vanderbilt, who was then chairman of the National Conference of Judicial Councils. It states: "The chief improvements in the administration of justice reported over a ten-year period were the enactment of comprehensive acts of procedure in nine states, the creation of judicial councils in twelve states and the granting or confirmation of the rule-making power to higher courts in six states."

Not only can groups of lawyers effect reform in the law, but it is remarkable what a single determined lawyer can do. In our Judicial Section we have noted with elation the determination shown by Judge Parker in seeing to it that the program written by this Section in 1938 should yield results. The legislative assemblies held in 1941 enacted into law substantial parts of that program. For instance, the Oregon legislature adopted four of the measures.[27] It also created an interim committee composed of members of the senate and of the house and charged them with the duty of studying all

17. Orfield, Criminal Appeals in America; Pound, Organization of Courts; see further 1941 Handbook, National Conference of Judicial Councils 29.

18. Practical suggestions for the use of those interested in law reform are set forth in Dayton, A Program for Legal Reform in the United States, XVI The Concensus 3; Fowler, A Psychological Approach to Procedural Reform, 43 Yale L. J. 1254; Clark, Methods of Law Reform, 36 W. Va. L. Q. 106; Sunderland, Hundred Years' War for Legal Reform in England, XV The Concensus 3; Sunderland, The English Struggle for Procedural Reform, 39 Harv. L. Rev. 725. The Panel, a bi-monthly publication of the Association of Grand Jurors of New York County, contains a wealth of material showing practical methods of accomplishing legal reform. See especially 15 The Panel 19; 14 The Panel 1; 12 The Panel 5; 10 The Panel 1; 10 The Panel 14; 10 The Panel 25.

19. Shelton, The Annals of the American Academy of Political and Social Science, Sept. 1917, pub. No. 1146; 12 Va. L. Reg. (N.S.) 513; Clark, The Bar and the Recent Reform of Federal Procedure, 25 A. B. A. Jour. 22.

20. Illinois Procedure Goes Modern, XVIII J. Am. Jud. Soc. 40.

21. Before the new Practice Act went into effect the University of Chicago Law School conducted institutes in Chicago to familiarize the bar with the new practice. Following the promulgation of the new Federal Rules of Practice institutes were held throughout the country. These institutes avoided the possibility that the experience which the Field Code underwent might be repeated.

22. Jury Service Elevated in Cleveland, XV J. Am. Jud. Soc. 8.

23. For a list of acts written by the commissioners and of the states wherein the acts have been adopted, see 1940 Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings 468; Brown, Lawyers and the Promotion of Justice 224.

24. Root, The Origin of the Restatement of the Law, 3 Okla. S. B. J. 308.

25. 1941 Handbook National Conference of Judicial Councils 124.

26. 22 J. Am. Jud. Soc. 112.

27. See 1941 Oregon Laws, Chaps. 257, 309, 313 and 414.

remaining parts of the program and of reporting to the 1943 legislative assembly.[28] We also observe with satisfaction the successful efforts made by Judge Joseph A. Moynihan in Detroit which cleared up a badly congested court docket. This he did by invoking the assistance of pre-trial conferences, but without legislative aid.[29] In fact, there is much that can be done for procedural improvement by every judge without legislative action. Judge Moynihan's pre-trial conferences and Judge Parker's annual judicial conferences are only two of many illustrations which are available to sustain the statement just made. Tact, courage and vision are the means of tapping this great reservoir of judicial powers.

The instances which I have just reviewed clearly show that the lawyer of today is not reactionary. He is prepared to assume leadership on behalf of improvement. They show that he has great capacity for undertakings of that character. They prove that his state legislature, and even the national congress, will hark to his appeals. They show that he can enlist the support of his bar associations and that laymen will not turn deaf ears to his appeals.

But before the lawyer can make an effective appeal he must have militant faith in the judicial branch of our government. He must desire to see that the judicial branch functions so effectively that it will, in fact, be one of the three great branches of our government. If that faith is sufficiently strong, he will find the means of accomplishing the end. No member of the profession who has that faith will be content, after riding to the courthouse in a twentieth century automobile, to then proceed with a trial under rules of procedure parts of which date back to the fourteenth century.[30]

We must recognize that improvement of the rules of judicial procedure is peculiarly our business. Very definitely it is not the business of the layman. Unlike the substantive law with which the layman is in daily contact, only the trial attorney and the judge have contact with procedural law. Hence, we are the best adapted of all to make those rules what they should be; and it is our duty to do so. But if we will not perform that duty, we shall have no cause for complaint if the layman's dissatisfaction with archaic procedure brings about the creation of administrative bodies and other expedients which take our business from us.

The lawyer, in making his appeal for bar support, must depend upon practical considerations. If he comes as a theorist, no time will be wasted upon him. Lawyers are practical men and show a distrust for the theorist and for the individual of a philosophical trend of mind[31]. But in calling ourselves practical men, we must not fall into the classification mentioned by Disraeli when he said, "The practical man is the man who practices the errors of his ancestors."

The appeal for bar support must be sincerely made. Any effort at self-exploitation made under the guise of law reform will be quickly sensed and rebuffed. The layman's help is always available, but the lawyer who seeks it without being frank with his fellow practitioners may find that he will neither secure the help of the layman nor hold the confidence of the bar.

The instances I reviewed a moment or two ago further indicate that the advocate of proposals for improvement must not attack the integrity of the law in general nor destroy public confidence in the courts. The reformer who violates either of these precepts will call down upon himself and his efforts the swift condemnation of the profession. Again, he must not challenge the underlying philosophy of the law, for such an attack will needlessly invite the opposition of the general membership of the legal profession[32]. Every measure forming a part of the Judicial Section's program is in accord with the underlying philosophy of our law. All of them are intended to strengthen our legal structure. Their purpose is to make the administration of justice more certain, more prompt and less expensive.

The proponent of reform measures must never "talk down" to legislators. Regardless of his professional standing, he must recognize every legislator as his equal. Again, he must recognize that procedural reform is devoid of human interest and of popular appeal. Therefore, a legislator who interests himself in such measures does so from the highest motives and purely as a matter of duty.

Those who present reform measures must never claim for themselves nor for their measures superior ethical values[33]. The poser will be quickly laughed down to his proper level by both the bar and the legislative assembly.

Finally, the proponent of the measure must bear in mind that all mankind exhibits a tendency to continue habits long after the reasons for a change have manifested themselves[34]. Therefore, he has the burden of proof;

(Continued on page 769)

28. See 1941 Oregon Laws, p. 909. The Honorable Charles A. Sprague, Governor of Oregon, in his message to the 1941 legislative assembly, expressly mentioned the American Bar Association Committee for Oregon appointed by the Judicial Section. Subsequently he sent to the judiciary committees of the senate and the house special messages commending the recommendations of that committee.

29. 1938 Reports of the Section of Judicial Administration 23; Laws and Stockman, Monograph, Pre-Trial Conferences, published by the Section of Judicial Administration.

30. Ransom, The Layman's Demand for Improved Judicial Machinery, 73 The Annals of The American Academy of Political and Social Science 132.

31. This has been true from the early days of our profession. The practical-minded Coke throughout his life showed a contempt for the philosophical Bacon. Lyon and Block, Edward Coke, Oracle of the Law 283.

32. Fowler, A Psychological Approach to Procedural Reform, 43 Yale L. J. 1254.

33. Fowler, A Phychological Approach to Procedural Reform, 43 Yale L. J. 1254.

34. Zane, The Story of Law 42.

WHAT CHANGES ARE PRACTICAL IN LEGAL EDUCATION?*

By WILBER G. KATZ
Dean of the University of Chicago Law School

WE are considering this afternoon the law practice of the future. Judge Rutledge has spoken of the changing conditions which practitioners must face. Mr. Henderson has discussed the respects in which law graduates are unprepared for practice. What should the law schools do about it?

The task of the law schools in a period of rapid change is not easy. It is not merely a problem of adding new courses or of attempting to keep courses up to date. The fundamental problem is one of bringing students to an understanding of the very meaning of change in the law. Such an understanding is achieved only as students develop insight into the nature and function of law, the relation of law to social policy, the theory of precedent, and the relative functions of courts and legislatures. In short, the changing law has forced us to give attention to legal philosophy.

It was natural that law schools should largely ignore philosophical problems in the period of stability which ended with the last war. The pattern of legal education at the turn of the century reflected a view of the law as a fabric of rules and principles reasonably consistent and affording a fairly adequate basis for predicting decisions. Work remained for scholars, of course, in expounding and restating the law and for judges and legislatures in removing minor inconsistencies and defects. There were, to be sure, legal philosophers who discussed what law is and its place in the study of society. But courses in jurisprudence were usually reserved for graduate students, for prospective law teachers.

We have been conscious for a long time that this is inadequate training for the lawyer in a period of rapid change in legal doctrine and administration; but inertia and confusion of purpose long delayed appropriate changes in legal education. As a result, many lawyers reflect one of two unsound attitudes toward the changing law.

The first of these is what Chief Justice Stone described as an attitude of "futile resistance to the inevitable," of "nostalgic yearning for an era that has passed." Similar attitudes have appeared, of course, among lawyers in other countries and in other periods of change. Attacks by British lawyers on the work of Lord Mansfield have a familiar ring. One of these complained that "Instead of those certain positive rules by which judgments . . . should invariably be determined, you have fondly introduced your own unsettled notions . . . of substantial justice."

I am not implying, of course, that every change in the law is desirable or that lawyers should not oppose changes which they believe unwise. But too often dislike of change in law and practice prevents a lawyer from understanding what is actually taking place and the forces responsible for the change. To quote John Foster Dulles, change and uncertainty "is naturally disturbing and upsetting to lawyers and tends to create in them a sullen resentfulness which, unless overcome, will largely disqualify them from effectively representing their clients."

At the other extreme is the lawyer who takes the cynical position that the law is nothing but an argumentative technique. The classic statement of this attitude is the book "Woe Unto You Lawyers" by Professor Rodell of Yale. Rodell's position, in his own words, is that the law is nothing but a high-class racket, that the whole of the law is a hoax, a balloon, a lot of empty words. In view of the general skepticism of the past decades, it is not surprising that many young lawyers and law students have been strongly influenced by views such as these.

How are students to be made immune to the development of these attitudes? Many law teachers have come to realize that the study of the philosophy of law may furnish an effective antidote. At the Columbia Law School, for example, a course in jurisprudence has recently been made compulsory for all third-year students. In other schools the problem is being attacked in different ways. At Chicago, we introduce the study of legal philosophy in the first year. We think that it is important for students to face and discuss the basic questions about the function of law in a changing world before his approach to the law has too far solidified. Whatever the differences on matters of detail, there is wide agreement on the proposition that increased emphasis on the theory and philosophy of law is a most practical step in current legal education.

A second change which has become a practical necessity is increased attention to legislation. This does not mean that students should learn quantities of statutory law or that courses in legislation should be

*Address before the American Bar Association, Indianapolis, September 30, 1941

made compulsory. But in the study of many fields of law, more attention must be given to statutory developments. I do not think that it is practical to teach corporation law, for example, without requiring each student to become familiar with the use of the general corporation law of his own state. Only by constant practice does a student become skillful in the art of reading and applying complicated statutes, and we all know that this is an irksome task, one which we neglect all too readily.

The third practical change in legal education is dictated by the fact that some of the most troublesome of recent changes are in the economic organization of the country. No lawyer is ready to meet them unless he has an understanding of economics. There is, of course, nothing new in the recognition of the close relation between law and other social sciences. Almost fifty years ago Mr. Justice Holmes said, "I look forward to a time when . . . we shall spend our energy on a study of the ends sought to be obtained and the reasons for desiring them. As a step toward this ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. For the rational study of law, the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."

Until recently we have gone on the theory that the student can learn his economics in college and his law in law school, and that the inter-relations will take care of themselves. It is not surprising, of course, that the synthesis has almost never taken place.

Our failure to develop the inter-relations between economics and law has not only handicapped our study of modern legislation but it has also impoverished our understanding of familiar doctrines of the common law. Take, for example, the elementary rule making an employer who is entirely without fault liable for the negligence of his employees. Even Holmes referred to this liability as wholly anomalous. He found in it only a survival of the ancient absolute liability of the head of a household or a fiction of identity of master and servant. Surely a more satisfactory understanding of the doctrine is to be reached in the light of the general theory of a competitive free-enterprise society. In such an economy productive activity is directed, of course, by the decisions of business men. And, if an industry involves special risks that outsiders may be injured by negligent employees, it would seem desirable to force business men who contemplate entering the industry to take this factor into account. If the prospective returns in the business are not high enough to cover the cost of insuring compensation for such injuries, from the social point of view the business should probably not be undertaken. In other words, we may understand the imposition of liability as an effort to assure that business decisions are responsibly made in the light of all the social costs of the enterprise. Without such liability, industries in which risks are relatively large would tend to be extended uneconomically. Freedom from liability would operate as a subsidy.

The same analysis throws light upon the liability of a parent corporation for the debts of its subsidiaries. While the parent is usually immune from liability, even if it holds all of the subsidiary's stock, liability is often imposed if the subsidiary was organized with capital inadequate for its normal risks. If such were not the law, if a corporation could undertake risky ventures through inadequately financed subsidiaries without jeopardizing the parent's assets, irresponsible business decisions would be encouraged. The traditional discussion of such cases has been in terms of "disregarding the corporate fiction" when the subsidiary is found to be a "mere agency or instrumentality" of the parent. These terms, however, do not suggest why the courts have found the "agency or instrumentality" relation principally in cases of subsidiaries inadequately financed. The analysis I have suggested furnishes an explanation for this emphasis on adequacy of capital.

It has not been easy, of course, for the law schools to arrange programs through which the study of economics and related subjects may illuminate the understanding of law. A few schools, including Washington University of St. Louis and the University of Chicago, have developed combined four-year programs including courses in fields such as economics. A recent report of the Dean of the Columbia Law School has suggested a similar plan for his school. Two years ago Harvard Law School inaugurated an experiment in the same direction, under which Harvard College students may commence their law study before completing the work of the college.

Another mode of attack upon the problem is through the development of courses in which legal and economic aspects of critical problems are studied together. Let me take as an example the course in Law and Economic Organization to which students at Chicago devote half of their time in their senior year. For the first two months the work consisted of concentrated study of the anti-trust laws and of labor law in the light of the theory of prices and wages. We discovered that one striking advantage in this arrangement was that it made the students question the adequacy of the simple approach which many of them easily take, regarding monopolistic organization of industry with strong suspicion, and monopolistic organization of the labor market with strong favor.

The next two months were devoted to a study of the marketing and employment problems of the steel industry. After an introductory view of the history of the industry and its major units, the study was organ-

ized around three alternative lines of governmental policy. These three policies might be described as the "let well enough alone" policy, the policy of "enforced competition," and "combination-with-regulation" policy. The steel anti-trust cases and the court and trade commission cases dealing with the basing point system of prices were studied in detail. The practicability of splitting some of the larger companies into competing units was considered and students were required to explore with some concreteness the difficulties involved in such a program. Attention was given to the types of decree entered in other anti-trust dissolution cases and to the techniques being developed in the enforcement of the "death sentence" on utility holding companies. Some of the evidence and studies presented to the TNEC in connection with the steel industry were considered. In investigating the combination-with-regulation policy, the NRA experience was considered, as well as other proposals for a planned economy.

The study of the steel industry included a survey of labor history, with some attention to the early strikes and the NRA period. In dealing with current problems, the legal material was supplemented by discussion led by a vice-president of one of the steel companies in charge of its labor relations and by an organizer of the CIO steel union. The operation of the National Labor Relations Act was considered in some detail, including the report of the Smith Committee on the NLRB and its work.

The work of the second half year was directed toward depression problems. Bankruptcy and corporate reorganization were studied as types of legal machinery for dealing with the problem of failure in a profit economy. The study included an effort to examine the various economic roles which the law of insolvency administration might be expected to fulfill, in guiding the allocation of resources, facilitating the transfer and abandonment of invested capital, and permitting the continuance of over-capitalized enterprises.

While experiments such as these appear to have great promise, it is by no means clear what sort of changes in legal education will most effectively enrich the study of law. In this connection I should like to urge that the experimental character of the present stage of legal education should be kept in mind by members of this Section in their efforts to improve standards, and by state authorities in framing their requirements for admission to the Bar. There has been a tendency in some states to phrase the rules in a rigid form which might check some of the most promising experimentation. For example, there is a requirement in some states that a student must have completed his college study before beginning the study of law. It would not be difficult, of course, to modify the rule so that it will be satisfied by the type of program I have referred to, in which some of the college subjects and law are studied together.

I have been speaking of changes in legal education made necessary by the changing law and practice. But what of the criticisms that law school training should be more practical, that graduates are turned out unprepared to practice law? They have studied the law of torts but they know nothing of what it means to prove or defend an accident case. They know the rules on offer, acceptance, and consideration, but they act as though they had never seen an actual contract. They know what constitutes a preference or a fraudulent transfer, but haven't the first notion about conducting a meeting of creditors or the routine of bankruptcy practice. They have studied the law of pleading, but they do not know how to draft a simple complaint. They can recite rules of evidence, but they know nothing of examining a witness. They are innocent of the arts of negotiation and are baffled by the task of investigating a complicated question of fact. In sum, the only thing for which they are trained is the briefing of questions of law, but even here they are of little use for the memoranda they write are neither clear nor persuasive.

We cannot sidestep these charges. If we are honest we must admit that law schools do not turn out graduates ready to practice law. But if I may believe a leading doctor with whom I spoke this summer, our profession is not unique in this respect. In his opinion, when a medical student receives his M.D. and finishes his internship, he is only just ready to begin the study of medical practice.

Not only is it impossible for law schools to turn out graduates fully prepared for the work of the Bar, but it is a serious mistake for them to try. This does not mean that law schools are not concerned with the actual problems of practice. We must of course see to it that law is studied as a working system, and that rules of law are considered not as ends in themselves, but for the purpose of their application to practical situations. This is largely a matter of the personnel of our faculties. As our vigorous and candid chairman put it in a letter to me some two years ago, we must see to it that our law teachers are not "theoretical asses who don't know a practicing lawyer from a billy goat or who have no conception of his mental processes, his problems, his clients, or the function that he has to perform."

The one thing that the law schools can do with some effectiveness is to give a thorough groundwork in the general principles of law and in related bodies of knowledge. But they cannot do this task well if major emphasis is placed upon the immediately practical aspects of law work. In other words, it is not practical for the law schools to attempt to give instruction on the how-to-do-it level. It is a mistake, I think, to offer courses in bankruptcy practice or probate practice. And in the important field of taxation, what is the most practical type of course? Should law schools attempt to present a detailed survey of regulations and rulings, or is it more practical in the long run to focus the study

upon major tax problems against a background of the economics of taxation and government finance?

There is something to be said for the proposition that the most practical education is the most theoretical. My own opinion has changed considerably in the past ten years. Some years ago, I gave a course in the reorganization of corporate and real estate bond issues. At the time, I was also practicing in this field, and I attempted to reproduce for my class the problems with which I was struggling downtown. Section 77B was still in its infancy and we were still puzzling about the application to reorganizations of the Securities Act of 1933. The state courts were in doubt as to the duties of indenture trustees and as to their own power to pass upon reorganization plans. I proceeded to swamp my students with unreported decisions and opinions of counsel, with deposit agreements, plans of reorganization and letters of solicitation, with practical techniques for dealing with the recalcitrant minority and the strike-suit lawyer. I think they enjoyed the course. It gave them the exhilarating illusion of dealing with real and current problems. They felt that they were learning something which they could really use as soon as they got out of school. But I have little doubt today that I was cheating them. When they came to the Bar the following year, the critical problems of reorganization practice were quite different. They had, of course, learned something. In my zeal for presenting the latest "dope," I had, to be sure, given them some insight into the persistent problems in the field—the problem of protective committees and conflicts of interest, of the place of indenture trustees, and of criteria for determining the fairness of reorganization plans. But how much more valuable would my course have been if I had omitted many of the questions of temporary practical importance and developed the place of the subject in the economics of corporate enterprise.

It is not only that the time is insufficient for both basic theoretical discussion and instruction of an immediately practical sort. A more serious difficulty is that with most students, the latter type of instruction defeats the former. After imbibing the strong drink of practical instruction, few students have a taste for the subtler flavors of basic principle.

For similar reasons I am opposed to the introduction of courses on trial technique—the handling of juries, adverse examinations before trial, the framing of questions for witnesses and the art of cross-examination. I believe that these techniques are much better learned in connection with actual practice and by watching experienced lawyers in action. And not only does law school instruction in these arts fall short of its mark, but it undermines the students' interest in fundamental legal theory.

There is one lawyers' technique, however, which the law schools should and can do more to develop. This is the art of writing. We may perhaps place upon the colleges some of the blame for the serious illiteracy of law-school graduates, but the law schools must accept their share. Many schools are making serious attacks upon this problem. Written work of various kinds is found increasingly among law school requirements.

At the University of Chicago, for example, the training in writing begins in the first year. Entering students are divided into small groups under the leadership of a faculty member or a graduate tutor. Topics are assigned for individual investigation and the reports are returned with written criticisms which are discussed in great detail in lengthy individual conferences. Students are required to rewrite their papers, often two or three times. We are convinced that only by some laborious process such as this can students learn to organize legal material and to express themselves clearly and persuasively.

I have suggested that much of a lawyer's education must follow his graduation from law school. Some of it will come, of course, from his associates in practice and some, we regret, through mistakes at the expense of his clients. But the work of this Section in connection with legal institutes and practicing-lawyer courses testifies to the need for formal post-graduate education for the practitioner. I should like to conclude with one point with respect to the relation between law school studies and this post-graduate instruction.

I think that there is need for three types of institutes or courses for practicing lawyers and that a clear separation of these types would contribute much to the whole program. In the first place, practicing lawyers have shown an interest in what the doctors call "refresher courses,"—general lectures, refreshing their recollection of material studied in school and bringing them up to date as to developments since graduation. In the second place, there is a call for detailed technical instruction in specialties for lawyers with considerable experience in the field. Both of these types of institutes or courses are to be distinguished from the kind of instruction needed by the young lawyer recently out of law school. I should like to see courses in the practical aspects of law work organized expressly for the "green" practitioner. There is no reason why the young lawyer should not expect to pursue regular evening study during the first five years of his practice. Local bar associations should, I believe, take the responsibility for the organization of such instruction. In this type of teaching, the experienced practitioner, if he is also interested in education, can be much more effective than a law school professor. If such post-graduate instruction were generally available, the law schools would be relieved of much of the pressure to introduce such courses into their programs. The proper tasks of the law schools would be clarified and the energies of faculty members released for the performance of these tasks.

SELECTION AND TENURE OF JUDGES*

By LAURANCE M. HYDE
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THERE are three very important problems in judicial selection and tenure, namely: How to select a man who is competent to be judge? How to keep him on the bench if he does become a good judge? And, how to get rid of him if he does not? The first problem, of selection, is likewise divided into three parts: To find a man with the three essential qualities of personal integrity, judicial temperament, and adequate legal training. The two remaining problems of tenure, both are: To make the judge's tenure depend as much as possible upon the record he makes in service on the bench. At the 1940 election, the people of Missouri adopted a constitutional amendment intended to make possible the recognition of these essential judicial qualities, in selection, and to make tenure depend upon the test of satisfactory service.

Voters cannot tell, by reading a man's name on a ballot or seeing his picture on a telephone pole, whether he possesses the three essential judicial qualities. Most voters have little more than this as a basis for their decisions on state-wide judicial officers or on local judicial officers in large cities. It requires personal acquaintance to determine whether a man has the essential judicial qualities. Usually, in rural districts of small population, the majority of the voters either do have such personal acquaintance with their candidates for judicial office or know someone who has. This was particularly true in the past when a term of court was a great event and gathering place for people of rural counties and when most of the men of every community had the informative contacts of jury service. In elections on a state-wide basis, people may learn something of the personality and ability of candidates for Governor or Senator, who go about the state appearing before large crowds discussing their views concerning governmental policies in which the voters are intensely interested. Since judges cannot do this, voters do not expect to see state judicial candidates or to be able to have any sure source of information about them. Therefore, they do not get interested in them and either vote blindly or follow the suggestion of someone who does have an interest. [See Selection, Tenure and Retirement of Judges—Hall, 3 Journal Am. Jud. Soc. 37.]

This lack of interest, because of lack of sure means of information, is the reason why non-partisan judicial elections, with competing candidates, may show worse results than elections on political tickets. Party labels are better than no labels at all. If voters have no means of their own for selection, necessarily, someone must make a selection for them. Since a political party must take the responsibility for failures of its candidates, party leaders will make an effort to obtain more or less intelligent selections. The nominating primary election has weakened their responsibility and helped the chances of the backslapping self-advertiser and the machine-made candidate. Another trouble is that the politically minded often consider a judicial position like any other office, as only a reward for the faithful, and are likely to overlook the necessity for other requisite qualifications. The same thing is too often true in the system of appointment by the chief executive, whether with or without the check of Senate or other confirmation. Still worse, however, is the fact that, under the party primary and election system, tenure depends even more than selection, upon issues wholly irrelevant to any judge's ability, record or qualifications. This has been illustrated by recent experience in Missouri, where, in the twenty years between the first and second World Wars (1919 to 1939), only twice (1922 and 1936) was a judge of the Supreme Court, who had served a full ten-year term, re-elected to another term. The ten elections during this period all turned on national party issues. Republicans, elected in Presidential election years up to 1932, could not be re-elected in the Congressional elections between Presidential elections. Democrats, elected in the Congressional election years between, were defeated in the years of Presidential elections. We believe that our new system will make tenure depend less on national political issues and more upon a good record for judicial ability. Moreover, it should improve judicial efficiency by allowing judges to concentrate their efforts entirely upon judicial work. As Judge Henry T. Lummus (Chairman of Judicial Administration Section 1938-1939) once pointed out, a politician may make a good judge if he can stop being a politician after going on the bench; but it is a great handicap to good judicial work to have a system which tends to compel every judge to be a politician to remain a judge.

Our new method is the result of research and study by the organized Bar. Certain features of it have been in operation in California since 1934. [See Reports of American Bar Association Committee on Judicial Selection and Tenure, 63 A. B. A. Reports 406; 65 A. B. A. Reports 246.] The House of Delegates of the American Bar Association, at its first meeting, in January, 1937, at Columbus, Ohio, adopted a resolution designed to establish methods of judicial selection "that will be conducive to the maintenance of a thoroughly qualified

*Address before the American Bar Association, Indianapolis, September 30, 1941.

and independent judiciary and that will take the state judges out of politics as nearly as may be." [See 62 A. B. A. Reports 1033.] This resolution specified two essential provisions for accomplishing this high aim:

First—Appointment by the executive "but from a list named by another agency composed in part of high judicial officers and part of other citizens, selected for the purpose, who hold no other public office."

Second—After a period of service, the appointee should "go before the people upon his record, with no opposing candidate, the people voting upon the question 'Shall Judge Blank be retained in office?' "

Missouri's new constitutional amendment contains both of these essential provisions. All of our appellate courts are under the new plan; but only the trial courts (circuit courts) of St. Louis and Kansas City are under it. As to all other trial courts (circuit courts) of the state, it is optional with the voters of any circuit to adopt it in a local option election if they want it.

Under our plan, selection is made by the Governor's appointment, but from a list of three names submitted to him by a Selection Commission. The Selection Commission, for our Appellate Courts (the Supreme Court and three Courts of Appeals), is composed of the Chief Justice of the Supreme Court as chairman, three lawyers elected by the Bar, and three laymen appointed by the Governor. The members, other than the Chief Justice, have six-year terms, staggered so that one term expires at the end of each year. [Rule 39 of Supreme Court of Missouri.] These members are not eligible to succeed themselves. The lay members are appointed by the Governor, one every two years, each from a different Court of Appeals district. The lawyer members are elected, one every two years, by the members of the Bar of the Court of Appeals District which they represent. The ballots for the election of lawyer members are sent out by mail by the Clerk of each Court of Appeals, and returned to him to be canvassed by the judges or lawyers appointed by them. The Selection Commissions for the city trial courts have five members. They are the Presiding Judge of the Court of Appeals of the District in which the city is located, as Chairman, two laymen appointed by the Governor, and two lawyers elected by the Bar. They also have six-year terms which are staggered so that the term of each member expires in a different year. Members of all Commissions are limited to one term, and no Governor can appoint all of the lay members of these Commissions, because our Governor has a four-year term and cannot succeed himself.

The next step, after a judge has been appointed from the list submitted, is that when he has served one year, the people vote at the next general election, following such year of service, upon the question of whether or not this judge shall have a full regular term. (Trial courts, six years; Courts of Appeals, twelve years; Supreme Court, ten years.) Thereafter, a judge given a full term must, at the expiration of each term, submit his declaration of desire for another term to be voted on by the people. Likewise, all judges in office at the time the amendment was adopted must, at the end of the terms for which they were elected, be voted on by the people to get another term. At all such elections, the judges' names will be placed on a separate judicial ballot, without party designation, the only question submitted being: "Shall Judge——, of the—— Court, be retained in office? Yes. No." Voting is by scratching one answer and leaving the other. Thus the judge has no opponent and runs against no political party, or national political policy, but only on his record of service on the bench. Unless that record is corrupt or obviously inefficient, there is every reason to expect that he would receive a favorable vote. Certainly, the voters may, if they desire, dispense with the services of a judge who has proven himself—dispensible.

Although the amendment to our Constitution, establishing this new system of selection and tenure, carried by almost one hundred thousand majority at the 1940 election, our 1941 Legislature has submitted as another constitutional amendment, a proposition for its repeal. Thus the battle must be fought over again at the polls next year. The success of the original campaign was due to the fact that it was not merely a lawyer's effort. The movement was sponsored by the Missouri Institute for the Administration of Justice, an educational corporation with one-third of its membership lawyers and two-thirds laymen. It was organized by the Missouri Bar Association for the purpose of enlisting lay support in proposals to improve the administration of justice, endorsed by the Association. [See 21 Journal Am. Jud. Soc. 193; 8 Mo. Bar Journal 270.] The 1940 campaign for the amendment was directed by this Institute. It had an active organization, with a County Chairman in every county in the state. It also had support from many civic, labor, farm and industrial organizations. Many laymen made effective speakers for the amendment. Groups of women workers did remarkable work in arousing interest and getting out the favorable vote. This organization will be available to work in the next campaign against repeal. In the meantime, the three Selection Commissions, which have been chosen, are ready to operate in case of any vacancy due to death or resignation.

No one should claim that our new method is foolproof or that it will operate automatically to select good judges. Like all institutions of Democracy, it will require eternal vigilance to prevent its perversion and to make it work properly. You can build the finest automobile and put it in the best possible mechanical condition, but the best machine will not have any more sense than its driver has. Likewise, the best governmental methods require public interest and intelligence to make them function properly. Of course,

we do not know how our new plan will actually work, because only experience can prove its success. One thing we do know: It will require a high degree of unselfishness and devotion to duty, on the part of lawyers, to make it work as its sponsors hope and believe it should. Members of the Bar are solely responsible for the choice of half of the members who are elected or appointed to the Selection Commissions. The members they elect, together with the chairman, make a majority of lawyers on each Commission. Lawyers can also have much influence in the appointment of lay members and in other phases of selection. They have the best opportunity to know whether prospective nominees have the essential judicial qualities. Thus, members of the Bar can have the kind of judges they want but it will require sacrifice of some time and effort on their part to see that their highest ideals are properly represented by the members of the Selection Commissions. In placing this trust in members of the Bar, the people of our state must have had confidence that our lawyers would recognize and fulfil these important obligations. Surely they will do so, not merely because more efficient operation of courts should aid their own business, but because lawyers know that confidence of the people in the proper functioning of our courts is essential to the continuance of our form of government and our way of life.

HOW THE COURT-MARTIAL WORKS TODAY*

By MAJOR GENERAL ALLEN W. GULLION

The Judge Advocate General, The Provost Marshal General, United States Army

IN my own behalf, I thank the Conference for the very great honor it has done me in asking me to address it. In behalf of the Army, I thank the Conference for the excellent work it has done through its Committee on Public Information. I am well aware of the time and effort expended by many of your members in acquainting the country with the necessities of national defense. The Army is grateful also for the devotion and energy with which the Conference has cooperated with the American Bar Association's Committee on National Defense which has performed such splendid service in aiding soldiers and officers of all ranks in the solution of their personal problems.

The scene is Philadelphia and the year is 1776—but the historic event which I shall recall to your minds is not the Declaration of Independence. On this very day, 165 years ago, on September 28, 1776, the new Pennsylvania constitution directed—"The penal laws as heretofore used shall be reformed by the future legislature of the state as soon as may be and punishments made in some cases less sanguinary, and in general more proportionate to the crimes." That constitutional mandate and the laws soon passed to implement it were the beginning of the reform throughout our country of the provincial criminal codes which, with their barbarities only slightly lessened, we had inherited or assimilated from England.

The year 1776 marks also the adoption for the Army of the United States of the first articles of war—substantially identical with the British Articles then in force. Starting with that easily remembered year of Independence, we have had in our country one hundred sixty-five years of experience with two separate criminal codes —the military code and the non-military code which, for convenience and with apologies to the Roman law for any terminological inexactitude, we Army lawyers sometimes call the civil code.

It may throw light on "How the Court-Martial Works Today" if we look for a moment at the criminal non-military codes in England and America as they existed at our point of departure, 1776. Then when we examine the court-martial today, both as to its procedure and as to sentences it adjudges, we may ascertain whether the military code has lagged too far behind—whether the conventional estimate of the military mind is correct, whether the military mind is too conservative and hidebound to adapt in its service enlightened modern methods of trial and punishment.

In 1776 in England over 200 offenses were punishable by death—among them larceny of 12 pence and poaching. Children of tender years were not exempt from capital punishment. In the Royal Services, the punishments were, if possible, more severe, and soldiers and sailors were sometimes flogged to death. In the colonies, generally speaking, the assemblies had in many cases softened the English system, but it was still a ferocious code ferociously administered with retribution publicly made that the Pennsylvania Constitution of 1776 and its implementing statutes reformed. That reformation set an example followed sooner or later by the rest of the country.

I shall digress for a moment to pay tribute to the men who, appalled by "man's inhumanity to man," were principally instrumental in that reformation. The father of the humane Pennsylvania codes was William Bradford, Attorney General of Pennsylvania, and later Attorney General of the United States. Bradford freely

*Address before the Junior Bar Conference of the American Bar Association, Indianapolis, Indiana, Sunday, September 28, 1941.

acknowledges the influence of Beccaria and of Montesquieu. Beccaria published his Essay on Crimes and Punishments in 1764. In that essay he clearly stated the principles of punishment which most of us today believe to be true ones. Those principles are (1) The purpose of punishment is to deter, not to wreak vengeance, (2) Deterrence is obtained not by undue severity but by the certainty and promptness of the punishment, and (3) The measure of punishment is the damage to society caused by the crime. Please bear in mind that last principle "The measure of the punishment is the damage to society caused by the crime." I shall refer to it later in explaining why certain offenses are punished more severely under the military than under the non-military code.

Although some ancient philosophers had similar ideas, Beccaria was influenced by certain eighteenth century French writings, particularly the "Persian Letters" and the "Spirit of the Laws" of Baron Montesquieu. I was once a weekend guest at La Brede, near Bordeaux, still the country seat of the Montesquieu family. The old chateau still stood with the Baron's enormous study hall unchanged since his death in 1755—the year of the Lisbon earthquake and the building of Dr. Holmes' "Wonderful One-Horse Shay." As I saw the dented leather chair in which Montesquieu sat as he dictated his great work to his daughter, Denise, I thought how he had indirectly influenced the reformation of the criminal code, and how his views on the separation of powers, known to leading members of the Constitutional Convention, were importantly incorporated in our great Charter of 1787.

Eight days before the adoption of the Pennsylvania Constitution, Congress enacted new Articles of War, very similar, as I have said, to the contemporary British Articles. In 1806 the Articles were revised. In 1916 due to the leadership of my distinguished predecessor, Major General Enoch H. Crowder, the Articles were thoroughly revised and many changes in procedure made especially with a view to insuring greater protection to the defendant who, in the Army, is always called the "accused." In 1920, following our experience in the first World War, other changes were introduced to guarantee more protection to the accused.

There are three kinds of courts-martial, the summary court, the special court, and the general court. The summary court consists of one commissioned officer, the special court of three or more commissioned officers, and the general court of five or more commissioned officers. Punishing power of the two inferior courts, summary and special, is limited by statute, the summary not being empowered to adjudge confinement in excess of one month and forfeiture of more than two-thirds of one month's pay. The special court may not adjudge confinement in excess of six months and forfeiture of more than two-thirds per month pay for six months. The punishing power of the general court is usually, by the wording of the article of war denouncing a particular offense, left to the discretion of the court. That apparently unlimited power does not however exist. In a few instances the article itself prescribes the punishment for a particular offense. In all other cases the President under authority given him by an article of war has prescribed a table of maximum punishment which may not be exceeded by any court, inferior or general. The punishment of all purely military offenses has thus been restricted to a reasonable maximum by the President. The punishment of nearly all offenses which are denounced by the common law and by non-military codes has been similarly limited by the President. In the rare event that an offense is committed which is not covered by the President's limit of punishment order, the punishment may not exceed that fixed as a maximum for that offense by the United States Penal Code or the Criminal Code for the District of Columbia. The sentence of no court-martial has validity until it has been approved by the officer appointing the court. The sentences of all general courts-martial are, as I shall explain a little later on, subject to a series of reviews and approvals or disapprovals in which the record of trial is examined not only to determine its legal sufficiency but also to insure that no sentence of unnecessary harshness is finally executed.

I shall take a general court-martial case and trace it from its beginning, that is, from the time of the commission of the offense to the time of the last review and final action in the War Department or in some cases by the President. Let us assume that the offense is the wilful disobedience of the lawful order of a commissioned officer. And here let me revert to Beccaria's third principle, namely, "the measure of the punishment is the damage to society caused by the crime." Here of course we should read in place of the word "society" the words "discipline and efficiency of the Army and indirectly the defense of the country." Forgive the cliché, but an Army without discipline is a mob, and discipline cannot exist unless all lawful orders are accorded implicit and immediate obedience. This is true in peace time; it is all the more true today when a grave public emergency exists. If in times like these wilful disobedience is not sternly dealt with, it will be difficult to obtain from a command that unquestioning and instant obedience so necessary to success in battle. Let us now take the case of a private who has wilfully disobeyed the orders of his battery commander and who, after having been allowed a cooling off period of twenty-four hours, persists in his flagrant disobedience. The case against him is started by the writing out of a formal charge supported by formal specifications reciting the details of each instance of disobedience. These charges and specifications must be signed and sworn to by a person subject to military law. This is the first of the safeguards against unfounded accusations. The papers containing the charges and specifications, after having been sworn to, are then transmitted to the accused's commanding officer, normally his colonel. The colonel may investigate

the case himself or he may refer it to a lieutenant colonel or some other officer, usually a field officer, for a thorough and impartial investigation. In that investigation the accused is present, is confronted by the witnesses against him, and is shown any documentary evidence against him. He may cross-examine the accusing witnesses, and he may introduce witnesses in his own behalf. He is carefully warned of his rights, namely that he is at liberty to make or not to make a statement as he pleases, but that if he makes a statement it may be used against him. At the close of the investigation the investigating officer makes a formal report in writing, summarizing the evidence for and against the accused and recommending trial or other disposition of the case. When the report of investigation is laid before the colonel, he may decide that the case is unfounded, in which event so far as the accused is concerned, the case is closed, or the colonel may decide that the matter may be disposed of by a heart to heart talk with the accused, or by what is called summary punishment, that is, restriction of privileges or imposition of extra fatigue. The accused may, if he so desires, refuse to accept summary punishment and demand a trial. Or the colonel may decide that the case should be sent to a special or a general court-martial. Suppose the colonel decides upon a general court-martial—in that event he transmits the charges, specifications, report of investigation and his recommendation to the officer exercising general court-martial jurisdiction, normally the major general commanding the division or similar unit. Up to this point the procedure under the military code is roughly analogous to the finding of a true bill by a grand jury, but it is readily seen that the military investigation prior to trial by a general court-martial is much fairer to the accused than the ex parte showing made by a state's attorney to a grand jury in the absence of the accused or defendant.

When the charges and related papers reach the major general or other officer exercising general court-martial jurisdiction, they must under the law be referred by that authority to his staff judge advocate, a trained military lawyer, for consideration and advice. The staff judge advocate is not a prosecutor but an impartial reviewer of the charges and the expected evidence. The staff judge advocate submits a written report to the general recommending trial, dropping of the charges, or other disposition of the case. Normally the general accepts the recommendation of his staff judge advocate. Let us suppose that trial is recommended. Thereupon all the papers are referred for trial to the trial judge advocate of a general court-martial, consisting, as I have told you, of five or more commissioned officers. For each such court there are appointed a trial judge advocate and an assistant trial judge advocate, a defense counsel and an assistant defense counsel. The defense counsel serve the accused at no expense to him. The duty of the defense counsel is to defend, by all legitimate methods known to the law, any accused ordered for trial before their court. The accused is furnished with a copy of the charges and specifications, upon which he may not be tried until after five days have elapsed, unless he consents. He is informed of his right to be defended by the regularly appointed defense counsel and that he may if he so desires employ civilian counsel, in which event the military defense counsel may be excused or serve as assistant counsel as he may elect. He may request additional military counsel and his request will be granted if practicable. All proceedings of the trial are stenographically reported and transcribed and a carbon copy of the record furnished the accused, without cost to him. In the course of the trial every safeguard which a defendant has in non-military trials is afforded the accused and the rules of evidence are applied as they are in non-military courts. In order to prevent junior members of the court from being influenced by the senior members, voting on the question of guilt or innocence and on the question of the sentence is by secret written ballot. Two-thirds of the members of the court must concur in a finding of guilty, otherwise a finding of not guilty is rendered. Here there may be less protection than a civilian defendant has before a trial jury where all twelve members must concur in a finding of guilty. On the other hand, there is no such thing as a hung jury in the case of a general court-martial. It may not be inappropriate to point out that the members of the average general court-martial are certainly superior in education and probably superior in intelligence to the members of the average jury. They should, therefore, be less subject to prejudice and less subject to an oratorical appeal, whether it come from the trial judge advocate or defendant's counsel. We in the Army believe that while a guilty man has less chance of acquittal before a general court-martial than he has in the hands of a trial jury, an innocent man on the other hand is less apt to be convicted by a general court-martial than he is by a jury. When the record of trial is transcribed it is read and subscribed by the president of the court and trial judge advocate and then transmitted to the appointing authority who ordered the trial, or his successor in command. Before the appointing authority takes action he requires his staff judge advocate to submit to him a thorough written review. In that review the evidence for and against the accused is analyzed. The effect of errors, if any, is considered and if any error, considering the record as a whole, has substantially prejudiced the rights of the accused, the staff judge advocate recommends that the finding be disapproved. The staff judge advocate also makes a recommendation whether the sentence should be reduced. If, following the report of his staff judge advocate, the appointing authority does not disapprove the finding, the record is transmitted to the Office of the Judge Advocate General in Washington. There at least two officers make an independent review of every record in which dishonorable discharge has been suspended. In the more serious cases in which dishonorable discharge is not suspended or in which a penitentiary is designated as the place of confinement, the

record is read by a statutory board of review of three officers who make a careful, written review and submit it to the Judge Advocate General. All cases involving general officers, or the dismissal of an officer or cadet, or the suspension of a cadet, or involving the death penalty are submitted to the Secretary of War and the President. Any important case may be so submitted. All of these reviews (the entire appellate procedure) are automatic and cost the accused soldier not one penny. Since the present Judge Advocate General has been in office, a systematic and successful effort has been made to harmonize and make uniform general court-martial punishments for approximately similar offenses arising throughout all our general court-martial jurisdictions, at present numbering about 100. A board of officers brings to the attention of the Judge Advocate General any sentence which seems unduly harsh or out of line with that customarily applied in other jurisdictions. If the Judge Advocate General agrees with that view of the sentence he sometimes writes to the officer who exercised general court-martial jurisdiction over the case, normally the major general of the division or similar organization, and suggests a reduction in the sentence. When this action is not effective, or if the need for immediate action is plain, the Judge Advocate General in cooperation with the Adjutant General takes the matter up with the Secretary of War or the Under Secretary of War with a view to having orders issued reducing the sentence to a proper limit. Mr. James V. Bennett, Director of the Bureau of Prisons, Department of Justice, who has been very helpful to the present Judge Advocate General in the latter's effort to harmonize all sentences, wherever practicable and to prevent the execution of harsh sentences, informs me that so far as he knows the Army affords the only example in American jurisprudence of effective procedure whereby sentences for approximately similar offenses are made reasonably uniform.

The problem of administering military justice lies not so much in preventing undue punishment as it does in preventing unnecessary trials. Reviewing authorities may and do, as we have seen, reduce excessive sentences, but it is the company commander who has most to do with reducing the number of trials for he is usually the first officer to whom knowledge comes of misconduct on the part of his men. He it is, therefore, who has most to do with whether an offender shall be tried. It is largely a question of personality and leadership. An alert, sympathetic and firm company commander can control his men except in rare cases without preferring charges. As a rule the best companies have the fewest trials. Ready resort to the court-martial as an aid to discipline too often means laziness or inefficiency on the part of the company commander. Under the leadership of Secretary Stimson and General Marshall, the Army today has the lowest peacetime court-martial rate in its history. On October 20, 1940, General Marshall addressed the Army, saying among other things,

> The task . . . before us is the expeditious development of a unified, efficient fighting force of citizen-soldiers.
>
> The Army of the United States, keenly aware of its great responsibility, assumes this task as a profound privilege.
>
> First in importance will be the development of a high morale and the building of a sound discipline, based on wise leadership and a spirit of mutual cooperation throughout all ranks. Morale, engendered by thoughtful consideration for officers and enlisted men by their commanders, will produce a cheerful and understanding subordination of the individual to the good of the team. This is the essence of the American standard of discipline, and it is a primary responsibility of leaders to develop and maintain such a standard.

At the same time the Judge Advocate General circularized all judge advocates as follows:

> In view of the rapid expansion of the Army, I am most solicitous that no case be recommended for trial by General Court-Martial until it has had the most careful consideration of all facts involved including the nature of the offense, moral and psychological factors, and the salvage value of the offender. I am confident that the exercise by staff judge advocates of imagination, humanity and sound judgment, with attention to technical details only in cases in which law and justice demand it, will greatly assist in obtaining results which attest the wisdom of Congress in adopting selective service as a peacetime method of personnel procurement.

There has been an encouraging drop in the rate of all three kinds of courts-martial in the last ten years. In 1931 twenty-eight out of every thousand enlisted men were tried by a general court-martial. When the present Judge Advocate General took office four years ago sixteen men out of every thousand were tried by a general court-martial. For the fiscal year ending last June only four and one-half per thousand were so tried. When the curve was plotted showing the general court-martial rate it was feared that the decrease in trials by general courts-martial would be offset by an increase in the number of trials by the inferior courts, but the curves for the special and the summary courts had fallen in lines roughly paralleling the descent in the general court-martial rate. In 1931 forty-six out of every thousand men were tried by special court. Last fiscal year only thirteen out of every thousand were so tried. In 1931 one hundred and five men out of every thousand were tried by a summary court. Last fiscal year only thirty-one out of every thousand were so tried. When you compare the present court-martial rate with that in President Cleveland's time, the result is amazing. In his first annual message to Congress on December 8, 1885, Mr. Cleveland reported that the Army numbered 24,705 enlisted men and that there had been 14,179 trials by all forms of court-martial during the preceding fiscal year. Of course some men had been tried more than once, but as Mr. Cleveland pointed out probably over one-half the Army had been tried, the percentage being 57%. Last year the percentage was 4.85 but we are not satisfied with that. 4.85 men out of every hundred tried by some form of court-martial is not good enough and we are constantly working to better it. The most vexatious problem arises out of petty thievery. Because of the close community in which soldiers live in barracks and in camps with no way of protecting their property at all times, a petty thief disturbs harmony, causes

mutual distrust and breaks up the teamwork necessary to the success of a company in peace or in war. There is an old Army saying, "There is no place in the Army for a petty thief." So until recently the almost invariable custom has been to try by a general court-martial all cases of prima facie petty thievery and to adjudge dishonorable discharge in the event of conviction. Dishonorable discharge for stealing brands a boy for life. So many distressing cases came to the attention of the Judge Advocate General that he recently circularized all staff judge advocates on the subject, saying among other things,

> . . . Often a company commander may dispose of a case without trial or trial may be had by inferior court when the circumstances indicate that the taking of property was due to impulse or sudden temptation. The company commander should try to determine whether the taking was the act of a real thief or an unpremeditated act in disregard of property rights, unfortunately not very uncommon in youth. Such cases offer an opportunity for the company commander to exercise discrimination and true leadership to the end that the self-respect of the soldiers and military manpower may be preserved.

In the remarkable series of lectures on The Common Law which Oliver Wendell Holmes delivered at the Lowell Institute at Boston over sixty years ago, he restated the three theories of punishment, retribution, reformation, deterrence. He showed very clearly that he leaned to the theory of deterrence. Reformation may in some cases be worked by punishment. In its disciplinary barracks the Army employs psychiatry and other methods of modern penology, but in my view there is a point very soon reached beyond which further confinement ruins rather than mends a boy. I have never been able to understand, much less follow, Hegel, protagonist of the retribution theory, and my brain whirls when I try to unravel his cryptic statement: "Wrong being the negation of right, punishment is the negation of that negation, or retribution." Anyhow retribution, like its analogue vengeance, may well be left to the Lord who has so emphatically laid claim to it. The Army will probably never reach the high plane of Clarence Darrow and proceed upon the theory that punishment does not deter. So the Army will continue in its effort to avoid trials wherever possible and to hold punishment down to that minimum which seems adequate to deter.

But should we go to war there will be instances where severe sentences may be adjudged for purely military offenses. Those sentences will be reviewed by my successor—for I expect soon to be relieved and devote my entire time to the office of Provost Marshal General—and reviewed by the Secretary or Under Secretary. If such sentences after review and final action still seem severe, I trust the country will realize that in the considered judgment of humane and sympathetic men the sentences were measured by the damage to military discipline and efficiency and to the safety of the country, and were regarded as necessary.

Improving the Administration of Justice

(Continued from page 758)

and our everyday experience with the tyranny of habit which chains us to the past, shows that this burden is not a light one.[35]

So much for methods. The lawyer who earnestly desires to bring about improvement will find the way. Now is the time to proceed. The recent enactment by Congress of the measure which conferred upon the Federal Supreme Court the rule-making power, the publication by that court of the new rules of practice now in effect, and the numerous institutes held throughout the country in order to prepare the bar for the new practice have given the profession a new outlook. As Judge Chesnut of Baltimore recently said, "This is the psychological time for our profession to make substantial improvements in judicial procedure. Experience teaches us that widespread consideration of procedural law comes only at long intervals of time[36]."

The member of our profession who fights for improvement does not fight alone. The law's progressive nature is his ally. Jurisprudence is a progressive science and its forward movement is going steadily on with the irresistible force of an on-coming glacier. The law has always kept pace with the development of human knowledge. Great expansion in knowledge has taken place in the current century. Since the Civil War we have been transformed from an agricultural into an urban, industrial society. These vast changes make it inevitable that the proposals for reform urged by the Judicial Section will be enacted into law. In fact, their enactment is overdue. The lawyer who fights for their enactment does not fight alone. He has a powerful ally in these irresistible forces. He may lose the battle, but he is bound to win the war.

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35. And as we contemplate the discharge of that burden we should bear in mind that one of mankind's failings, so Morgan and Maguire (Looking Backward and Forward at Evidence, 50 Harv. L. Rev. 909) say, "is a tendency to weary in well doing."

36. The statement was made by Honorable W. Calvin Chesnut August 9, 1940, in an address before the joint session of the Virginia State Bar Association and the West Virginia Bar Association. Judge Chesnut further said: "What has been all too true for many years in the past — that courts and lawyers have lagged behind other professions in improvement of their professional procedure — is certainly not true today. Or at least it can be said that in the last few years, and at the present time, both judges and lawyers are sharpening their mechanical tools in order to equip their workshop with the most modern streamlined procedure to accomplish the ultimate objective in the administration of justice."

George True Page

President, American Bar Association, 1918-19

FORTY-FIRST president American Bar Association, 1918-19.

Judge Page departed this life November 4, 1940, at his winter abode in La Jolla, California.

He was born in Spring Bay, a little Illinois river town, September 22, 1859. All his life's activities were in Illinois except a short period of his early youth when he sought health in the high altitudes of Colorado. Those who knew him were skeptical about the necessity of his search for health, but whether he really needed to seek it or not, he either found it or never lost it, for he always seemed to be the embodiment of physical and mental health and vigor. In "American Bar Association Leaders 1878-1928," Rogers describes him as "a tall broad-shouldered figure, stooping a little as if to diminish his conspicuous altitude."

We sometimes fail to appreciate how much men of power and distinction owe to inheritance from the maternal side. Judge Page's mother was a sister of a Justice of the Supreme Court of Illinois and both of her sons achieved distinction at the bar and won promotion to the bench.

At the age of 47 years Judge Page was elected president of the Illinois State Bar Association as a recognition of his leadership of the "down state bar" and his faithful and effective service to the organization. Soon thereafter he was elected to the General Council of the American Bar Association, became its chairman, and then was elected to the Executive Committee. In 1918 he was elected president of the American Bar Association.

Judge Page was one of the leaders of the courageous group who advocated the conversion of the AMERICAN BAR ASSOCIATION JOURNAL from a quarterly to a monthly magazine with a greatly enlarged scope of activity. With him in that venture were Stephen S. Gregory of Illinois, Hampton L. Carson of Pennsylvania, Chester I. Long of Kansas, John Lowell of Massachusetts, Cardenio A. Severance of Minnesota, and others.

In the years of Judge Page's presidency, the American Bar Association shared with other well disposed organizations and persons in the preoccupations and activities arising out of the first World War. Members of the Association, and other lawyers, joined the colors and the older men participated in the administration of the Selective Service Act, and other non-combative activities. As president of the Association Judge Page devoted himself to those activities. He took an important part in the reform of Court Martial procedure which began during the world war and later developed into the admirable code now in force.

In 1919 President Wilson appointed George Page judge of the United States Circuit Court of Appeals, Seventh Circuit. He gave eleven years of constant and faithful service in that high position. In 1929 he retired as Circuit Judge but continued to perform judicial service whenever called upon so to do. His work on the bench displayed the same power of mind and character which carried him from his obscure beginnings to leadership in his profession. He was a strong, just judge, unshakable by any other consideration than his devotion to the right.

PROOF OF THE PUDDING

By HON. HERBERT F. GOODRICH

Adviser of Professional Relations, American Law Institute,
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WRITING a restatement of the common law has been a big task. It has taken a great deal of time; it has cost a good sized sum of money. The American Law Institute began it in 1923 and the first "t" will not be crossed nor the last "i" dotted in the completion of the final volume until 1944. That volume will be the concluding one in the subject of Property, certainly a major field of work, where it is not surprising to find the typewriters clicking until the dead-line. The money for restatement has come, since the first, from the Carnegie Corporation. Without its loyal and continued support the work could not have been done.

If such a thing as a restatement of the law is possible, the Institute's plan and procedure should be a sure way to produce it. We had fine individual scholars in the law before the restatement began and we will have them after it is finished. Professor Williston had produced his famous work in the Law of Contracts before he went to work as Reporter in that field for the Institute. Individuals here and there have been writing law books in America for more than a hundred years. Some of them have been very good. But never before has scholarly work in the law been done with such painstaking thoroughness by many men working together. An acknowledged leading authority in his field writes an initial statement. It is subjected to close examination and critical suggestions by a group of advisers who are hardly less expert than the author of the statement himself. Then the product goes forward for examination by the group which makes up the Council of the Institute, many of whom have seriously devoted a great amount of time and thought to the drafts. And finally, a membership of several hundred lawyers has its chance to express an opinion upon the statement thus prepared. If the result so obtained does not express the legal consensus upon the principles and rules of law in a given field, there is no way of obtaining it.

Coming out of all this activity are by-products about which one is tempted to talk as well as to notice. There is the good that has come, for instance, from the association in the common task to the judge, the practitioner and the law teacher. Each has profited by the association. The man who follows law teaching as a profession has gained greatly in professional status in the last two decades. A large part of the gain has come through this association in the Institute work. One may mention, too, the stimulus to legal scholarship which this common relationship has given, as shown in an examination of the files of any one of our many good law magazines over the last ten-year period. The associated work of State Annotations preparation has, in turn, provided critical and objective examination of state law on a much larger scale than we have ever had before. These and other direct benefits need only be mentioned to be recognized.

The main product of all this work, however, is the Restatement. The test of the success of the undertaking which produced it is its use. This would not be true of scholarly work in some other fields. A series of experimental years in biophysics might be highly successful in extending the frontiers of human knowledge even though it had no immediate practical consequences in everyday living. But the administration of the law is more like applied science than pure science. Lawyers and judges do not discover new truth. They administer rules for human conduct based on the then state of their knowledge of things in the world. The Restatement does not purport to be a recording of conclusions to add to the sum total of human knowledge, but a carefully prepared statement of the law as it has been worked out through court decisions over many years in the common law world. The test of its success is its acceptance and use by lawyers and judges. The best test of truth, said Holmes, is "the power of the thought to get itself accepted in the competition of the market".[1] The test of the success of the Restatement will be its use in the market place of the law—law offices and courts.

It is obviously too soon to draw final conclusions, for the Restatement is not yet done. But the work in Contracts was published in 1932 and other volumes of it have been coming out every year since. We can state indications, if not final conclusions, from the experience so far. The evidence of the use of the Restatement by the practicing lawyer in his office could be secured, but it would be hard to collect. The purchasers of the volumes run up into the thousands. Where the books are in a firm library the extent of use could not be ascertained without consultation with the young men who do the research and who sometimes write the briefs. We, in the Institute, have received many statements from many lawyers that they use the Restatement constantly and to great advantage. But no statistics have been kept indicating either the number of users or the extent of use. Without an extensive survey there is no way of knowing what proportion of the purchasers of Restatement volumes the enthusiastic user represents.

Use by courts is another matter. There, too, one cannot go the whole way because while we have evidence that many trial judges constantly use the Restatement

1. Dissent in Abrams v. United States, 250 U.S. 616, 630.

for quick reference in the trial of cases and in the preparation of memoranda and opinions, there are no statistics on the subject. Some opinions by trial courts are reported; many are not. Those which are reported sometimes appear officially, sometimes in unofficial journals or volumes of reports. Statistics about trial court use of the Restatement, therefore, are so difficult to obtain that the undertaking is impractical.

Appellate court use is another matter, for that may be found by keeping track of citations in reported decisions as they appear. Furthermore, such use would seem to be a fair guide for generalizations about use elsewhere. Lower courts tend to rely upon authorities which reviewing courts accept. Certainly the bar will rely upon that which the courts state as authoritative. In appellate court use we have statistics and very interesting figures they are. They show a very extensive use of the Restatement by the courts. They show also a constant and large increase in that use. Part of the increase comes, of course, because there are more volumes of the Restatement available each year. The possibility of citation is obviously limited for a work which covers only one subject. But one may also conclude that the mounting citation list comes also from the growth and experience of the Restatement as a sound and accurate setting out of our common law.

The use of the Restatement as authority varies greatly in the courts of the various states. In some it is standard authority; counsel are expected to cite it when the point involved in the litigation is considered in the Restatement. In others the use is occasional; in a few it is almost unknown.

Lists of figures are dreary business for the general reader. The temptation is resisted, therefore, to analyze citation lists into years and subjects, but the totals are so striking that they are given complete up to December 1, 1940.

STATE	*TOTAL*	*STATE*	*TOTAL*
Alabama	30	Michigan	42
Arizona	51	Minnesota	200
Arkansas	9	Mississippi	194
California	175	Missouri	130
Colorado	36	Montana	21
Connecticut	166	Nebraska	110
Delaware	62	Nevada	11
Florida	50	New Hamphire	98
Georgia	56	New Jersey	110
Idaho	10	New Mexico	60
Illinois	87	New York	604
Indiana	31	North Carolina	13
Iowa	58	North Dakota	7
Kansas	270	Ohio	121
Kentucky	80	Oklahoma	61
Louisiana	42	Oregon	71
Maine	14	Pennsylvania	900
Maryland	187	Rhode Island	20
Massachusetts	396	South Carolina	2
South Dakota	27	Washington	86
Tennessee	40	West Virginia	48
Texas	114	Wisconsin	243
Utah	19	Wyoming	37
Vermont	17	Federal	885
Virginia	19	United States	38
		Grand Total	6158

How much weight the use of the Restatement had in a particular decision where the Restatement was cited is another question. How much weight does any one authority which a judge cites in an opinion have? It is doubtful, in most cases, whether the judge, himself, knows. He has a number of citations before him and he frequently puts several of them into an opinion. But the conclusion is his own, and neither he nor anyone else can make a quantitative analysis of it. The most frequent citation of the Restatement is its appearance, with other authorities, as authority for a proposition of law. Sometimes it stands alone, but frequently for a proposition which could have been supported by citing a line of decisions, had the author of the opinion chosen to do so. Sometimes the authority of the Restatement is the obvious foundation of a rule announced by the court. But that is infrequent and the occasions where it could happen are infrequent. Therefore, no attempt is made to ponder upon the imponderability—the contribution of a particular authority in a result reached.

But one can, with some interest, trace the citations of one or two of the subjects through the decisions. Down to December 1, 1940, the Restatement of Conflict of Laws had been cited 737 times by Appellate Courts in the United States. In 4 cases it was cited and not followed on a particular point. In each of these courts, however, it has been used to support a decision reached upon some other point, sometimes in many instances. In 580 instances the Restatement was cited in support of the decision reached by the court. The largest number of citations to this Restatement appears in Massachusetts, New York, Pennsylvania and the Federal Courts which are among the most important in commercial litigation in the country.

An analysis of the figures on citations in the law of Contracts gives about the same picture, but on a larger scale. Contracts has been cited 1825 times. On 15 occasions it was cited, but not followed. It was cited or quoted in support of the court's proposition 1413 times and quoted and expressly followed 47 times. Here, again, the largest number of citations appears in Massachusetts, New York, Pennsylvania and the Federal decisions.

This is impressive. The Restatement is rapidly becoming accepted as the authoritative statement of the common law. It should be a better, more easily understood and more certain common law than we had before. Will it be too rigid? In all probability, no. The reason for the negative answer can make part of another story if the Editor's patience still holds.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

State Statutes—Vehicle and Traffic Law of New York—Bankruptcy—Due Process of Law

The New York statute which authorizes the suspension of a driver's license if judgment is rendered against him for personal injuries caused by operation of an automobile and the judgment is not satisfied or discharged otherwise than by bankruptcy, is not obnoxious to the due process clause of the Fourteenth Amendment.

Reitz, appellant v. *Mealey*, Commissioner, 86 Adv. Op. 8; 62 Sup. Ct. Rep. 24; U. S. Law Week, 4018. (No. 21, decided Nov. 10, 1941.)

This is an appeal from a judgment of the United States District Court, N. D., N. Y., in an action brought to restrain the suspension of appellant's driver's license. A judgment had been rendered against him for personal injuries caused by his operation of an automobile, and certified to the Commissioner of Motor Vehicles. Thereafter appellant was adjudicated a bankrupt and the judgment scheduled as a debt.

Section 94(b) of the Vehicle and Traffic law of New York, as originally enacted, provided for a three years' suspension of the driver's license of any person if a judgment against him for injury to person or property resulting from the operation of a motor car were not paid within fifteen days after certification to the Commissioner of the judgment, its finality, and non-payment. The statute provided that the suspension might be terminated and the license restored on proof of satisfaction or discharge, "except by a discharge in bankruptcy."

Subsequently the statute was amended by adding a proviso that if the creditor consents in writing, the defendant may be allowed restoration of his license if proof of ability to respond to damages is furnished. Another amendment made it the duty of the County Clerk to certify the judgment only on demand of his creditor or his attorney.

A restraining order was issued and upon the hearing of the motion for injunction based on bill and answer a court of three judges denied the injunction and dismissed the bill. From that judgment appeal was taken to the Supreme Court and at the argument it was admitted that a discharge in bankruptcy had been granted and the judgment debt thereby discharged.

On appeal the judgment of the statutory court was affirmed.

MR. JUSTICE ROBERTS delivered the opinion of the Court. Opening the analysis of the statute as it stood before its amendment, he declared the statute not obnoxious to the due process clause of the Fourteenth Amendment. On this point he says:

> The use of the public highways by motor vehicles, with its consequent dangers, renders the reasonableness and necessity of regulation apparent. The universal practice is to register ownership of automobiles and to license their drivers. Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process. Some states require insurance or its equivalent as a condition of the issue of a license. New York chose to obtain the same end by providing for the revocation or suspension of a license if the holder is adjudged guilty of negligent driving. Section 94-b permits the restoration of the license upon payment or satisfaction of the judgment. As the court below has held, the effect of the statute as it stood prior to the amendment of 1936 was to make the license privilege a form of protection against damage to the public inflicted through the licensee's carelessness.

The opinion then takes up the contentions of the appellant based upon the amendments of the original act. First the one which provided that the license could not be restored until three years had expired from its suspension unless the judgment were paid or was discharged "except by a discharge in bankruptcy" and unless the licensee furnish proof of his ability to respond in damages of any future accident. On this point MR. JUSTICE ROBERTS says:

> If the statute went no further, we are clear that it would constitute a valid exercise of the state's police power not inconsistent with § 17 of the bankruptcy act. The penalty which § 94-b imposes for injury due to careless driving is not for the protection of the creditor merely but to enforce a public policy that irresponsible drivers shall not, with impunity, be allowed to injure their fellows. The scheme of the legislation would be frustrated if the reckless driver were permitted to escape its provisions by the simple expedient of voluntary bankruptcy, and, accordingly, the legislature declared that a discharge in bankruptcy should not interfere with the operation of the statute. Such legislation is not in derogation of the Bankruptcy Act. Rather it is an enforcement of permissible state policy touching highway safety.

Next the opinion takes up the appellant's insistence that the section as amended and as it stood at the time judgment was rendered against him, violates the due process clause. As to this contention MR. JUSTICE ROBERTS says:

> The claim of deprivation of rights without due process of law is frivolous. The State has seen fit to give the plaintiff an additional means of enforcing the payment of a judgment for damages inflicted in the operation of a motor vehicle by dealing with the registration and license of the driver. The grant of this additional remedy is not inconsistent with the concept of due process.

It was also contended that the amended act runs afoul of the bankruptcy act because of the power given the creditor to annul the immunity derived from his discharge, by having the judgment certified to the Commissioner of Motor Vehicles. As to this contention it is said:

> A more serious question arises in connection with § 17 of the bankruptcy act. The discharge of the debtor is a defense available against a suit on the judgment and against execution process issued upon it. And there is force in the argument that § 94-b, as amended, in truth deprives the debtor of the immunity afforded by his discharge, leaves out of view the public policy of the State or makes that public policy subservient to the private interest of the creditor by affording him the oppor-

*Assisted by JAMES L. HOMIRE and LELAND L. TOLMAN.

tunity to initiate, remove and revive the suspension of the license upon terms as to payments on account of his claim.

The District Court held that it need not consider the validity of the amendment of 1939 which requires the county clerk to certify the judgment only upon the request of the creditor. Under the old law it was the duty of the county clerk to certify every such judgment which had become final and remained unsatisfied for fifteen days. It is true that the bill alleges the judgment in this case was certified at the request of the plaintiff's attorney. But if the amendment is void because it confers a power on the creditor inconsistent with the effect of the debtor's discharge, and is eliminated from the statute for that reason, it still remains that under the old law the county clerk's duty to certify was mandatory, and this judgment would have been certified if he had performed his official duty.

An interesting point was raised by appellant that the whole statute fell because the original act was joined with unconstitutional amendments in a new, complete and independent act and that all fell together. As to this, MR. JUSTICE ROBERTS, referring to applicable decisions of the New York court, says:

These decisions hold that, where the original and amending acts were enacted by different legislatures, it cannot be thought that the original act would not have been passed except for the amendments, and this principle has been applied where the amending act declares, as it does in this instance, that the original act is "amended to read as follows" and then contains a redraft of the entire act with the amendment inserted. Whether an amendment stands by itself as an independent enactment, or is incorporated in the setting of the act which it amends, by a provision that the act "shall read as follows:" is a matter of draftsmanship or legislative mechanics. It does not touch the substance of constitutionality.

MR. JUSTICE DOUGLAS dissented and in that dissent MR. JUSTICE BLACK, MR. JUSTICE BYRNES and MR. JUSTICE JACKSON joined. The grounds of dissent are disclosed in the following excerpts from his opinion:

Judgments on claims of the kind involved here are provable (*Lewis* v. *Roberts*, 267 U. S. 467) and do not fall within any of the categories of debts excepted from discharge by § 17. Since they are dischargeable, a state cannot supply a device for their collection which survives a discharge in bankruptcy. The bankruptcy power is "unrestricted and paramount"; the states "may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." . . . The power which New York has placed in the hands of this judgment creditor is such an interference, though the discharge in bankruptcy be deemed to destroy only the remedy, . . . not the debt.

Under the New York scheme a creditor whose claim has been discharged still holds a club over his debtor's head. The state has given him a remedy which survives bankruptcy. If the bankrupt refuses to pay his discharged debt, the creditor will see to it that his driver's license is suspended. If, however, the bankrupt will pay up, the creditor will refrain.

* * *

But it is said that if this provision of the statute falls out, the old one falls in; and under the old one it was the duty of the clerk to certify the unsatisfied judgment to the commissioner. The difficulty with that view is that this is not that case. This bankrupt's license was suspended as a result of legal compulsion by the creditor. Whether it would have been suspended had the commissioner been advised that the amendment giving the creditor that power contravened the Bankruptcy Act is wholly conjectural. The question of whether a provision of a state statute survives an invalid amendment is a question of state law.

* * *

I do not think we can pass over that provision on the theory that the power of the creditor to lift the suspension does not appear to have been invoked in this case and that if the creditor attempts to exercise such power the commissioner will have to pass on the constitutional issue. Meanwhile the provision in question will give to the creditor enormous leverage. His bargaining position will be greatly fortified. The bankrupt is at his mercy where the means of livelihood are at stake.

* * *

In any event, the provision by that time would have spent much of its force. In short, this power which New York has given the creditor is a powerful collection device which should not be allowed to survive bankruptcy.

I agree that we should not meet a constitutional issue unless it is unavoidable. But that issue cannot be escaped here, unless we are to overlook the realities of collection methods.

The case was argued on April 3, 1941, and reargued October 22, 1941, by Mr. Harry A. Allan for appellant and by Mr. Jack Goodman for appellee.

Federal Jurisdiction—Diversity of Citizenship.

The parties to an action in the Federal District Court are to be aligned in relation to their real interests in the matter in controversy.

City of Indianapolis v. Chase National Bank, 86 Adv. Op. 27; 62 Sup. Ct. Rep. 15; U. S. Law Week, 4007. (Nos. 10-13 decided November 10, 1941.)

Actions were instituted in the Federal District Court for the Southern District of Indiana, by the Chase National Bank, a New York corporation, against the City of Indianapolis, and two Indiana public utility corporations. Jurisdiction was founded on diversity of citizenship and was sustained by the District Court and by the Circuit Court of Appeals, Seventh Circuit. Four separate actions were involved, in each of which certiorari was sought and granted by the Supreme Court. That court realigned the parties according to their real interests in the matter in controversy and reversed the judgment. The opinion of the Court was delivered by MR. JUSTICE FRANKFURTER. He stated the specific question as follows:

Does an alignment of the parties in relation to their real interests in the matters in controvery satisfy the seven requirements of diversity jursidiction?

He answered that question thus:

As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an "actual," . . . "substantial," . . . controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. . . . Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to "look beyond the pleadings and arrange the parties according to their sides in the dispute." . . . Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary "collision of interests," . . .exists, is therefore not to be determined by mechanical rules. It must be ascertained from the "principal purpose of the suit," . . . and the "primary and controlling matter in dispute." . . . These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts and this Court.

The fundamental principles applicable to jurisdiction based on diverse citizenship having been stated, the "actualities of this litigation" were examined. The abbreviation of names employed in the opinion is here followed.

Chase, a New York bank, was trustee under a mortgage to secure a bond issue of Indianapolis Gas. Citi-

zens Gas was formed to compete with Indianapolis Gas in the distribution of light, heat and power. Its ordinance franchise from the city of Indianapolis for a twenty-five year term provided for a transfer of its property and business to the city at the end of that period subject to the company's "outstanding legal obligations." After some years of competition, Indianapolis has leased its plant to Citizens Gas for ninety-nine years, agreeing to pay interest on lessor's outstanding bonded indebtedness and six per cent return on Indianapolis Gas common stock. Twenty years later Citizens Gas conveyed its entire property including that leased from Indianapolis Gas to the city, but the city refused to regard itself bound by this lease. Controversy then arose which culminated in the filing of a bill of complaint by Chase against the city and the two gas companies praying that the lease be declared valid and part of the security for the performance of the mortgage bonds. The city and Citizens Gas denied that the lease was binding on them and alleged that the controversy existed solely between Indianapolis Gas and the city, citizens of the same state. The District Court found no collision between the interest of the plaintiff Chase and the interests of Indianapolis Gas Company, realigned the latter as a party plaintiff and finding identity of citizenship between some of the plaintiffs and the remaining defendants dismissed the suit for want of jurisdiction. The Circuit Court of Appeals, one judge dissenting, reversed, and certiorari was denied.

On remand to the District Court, Chase filed a supplemental bill alleging default in payment of interest and praying judgment for the amount of the unpaid coupons and alleging that neither of the gas companies had property sufficient to pay the defaulted interest other than that conveyed to and under control of the city. The District Court held the lease unenforcible against either the Citizens Gas or the city, and that judgment be entered only against Indianapolis Gas. All the parties in interest appealed. The Circuit Court of Appeals sustained their position and again reversed and held further that Chase was entitled to a judgment for unpaid interest. Certiorari was granted because of important jurisdictional issues involved.

The Supreme Court reversed. The opinion of the court was delivered by MR. JUSTICE FRANKFURTER who said:

> The facts leave no room for doubt that on the merits only one question permeates this litigation: Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City? This is the "primary and controlling matter in dispute." The rest is window-dressing designed to satisfy the requirements of diversity jurisdiction. Everything else in the case is incidental to this dominating controversy, with respect to which Indianapolis Gas and the City, "citizens" of the same state, are on opposite sides. That the case presents "only one fundamental issue" and that that is the obligation of the City under the lease, Chase admits and indeed insists upon in its brief on the merits. Chase and Indianapolis Gas have always been united on this issue: both have always contended for the validity of the lease and the City's obligation under it.
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> Plainly, therefore, Chase and Indianapolis Gas, are colloquially speaking, partners in litigation. The property covered by the lease is now in the City's possession; Chase is simply acting to protect the bondholders' security. As to Indianapolis Gas, if the lease is upheld, it will continue to receive a six per cent return on its capital, and the burden of paying the interest on its bonded indebtedness will be not upon it but upon the City. What Chase wants Indianapolis Gas wants and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase when, as a matter of fact, the interests of the City and of Indianapolis Gas are opposed to one another. Therefore, if regard be had to the requirements of jurisdictional integrity, Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction. But such realignment places Indiana "citizens" on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship. We are thus compelled to the conclusion that the District Court was without jurisdiction. • • •
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> The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts" in order to keep them free for their distinctive federal business. • • •
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> The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.

MR. JUSTICE JACKSON delivered the dissenting opinion in which the CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE REED joined.

After reviewing the facts in controversy and emphasizing those upon which the dissent was based, MR. JUSTICE JACKSON says:

> This Court now destroys federal jurisdiction of the case by a transposition of parties, the radical nature of which appears most clearly from the judgments rendered below. It forces into the position of co-plaintiff one party which the District Court adjudged entitled to recover over a million dollars and another which the District Court adjudged solely liable to pay that sum. This same adversity was found by the Circuit Court of Appeals, which held the one entitled to receive and the other obligated to pay this sum with increase due to the lapse of time. It modified the judgment only by including two additional judgment debtors on whom it fixed primary and secondary liability, but continued the judgment against Indianapolis Gas with a tertiary liability for its satisfaction. The subtlety by which a judgment debtor is transfigured into a creditor for jurisdictional purposes deserves analysis, if for no other reason than because of its novelty. • • •
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> Jurisdiction of the federal courts is indeed a variable and illusory thing, if the jurisdiction which a District Court admittedly has of two separate causes of action is lost when they are united in one, agreeably to the federal rules of procedure, because the one defendant as a surety seeks to enforce its equitable right to be exonerated by the other who is alleged to be the principal debtor.
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> The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy where no real cause of action is asserted against him by the plaintiff, but it does not admit of such treatment of a defendant against whom the plaintiff asserts a cause of action within the jurisdiction of the court. The plaintiff cannot rightly be deprived of the benefit of that jurisdiction, conferred upon him by laws enacted pursuant to the Constitution of the United States, because the court may think that such a cause of action is relatively less important than that asserted against another defendant or because one action "dominates" the other or because one is more "actual" or "substantial" than the other.

> We would be diligent no less than the majority to prevent imposition on the jurisdiction of the federal courts by means of "window dressing" or "artifice." We find in this case nothing that warrants either characterization, and we think that the precedents invoked to support today's action reveal the gap which divides the doctrine of realignment as heretofore applied by this Court from the application made of it today.

MR. JUSTICE JACKSON then analyzed the cases cited in the majority opinion and closed his dissent as follows:

> We would follow the words of the jurisdictional statute when it is sought to restrict its application, quite as faithfully as when the effort is to enlarge it by recourse to doctrines which conflict with its words.

The case was argued on October 15 and 16, 1941 by Mr. Howard F. Burns for Chase National Bank, Mr. William H. Thompson for City of Indianapolis, Mr. William G. Sparks for Citizens Gas Company and Mr. William R. Higgins for Indianapolis Gas Company.

Taxation—Sales Taxes—Application to Contractor Performing Government Work

The Alabama sales tax is constitutionally applicable to the sale of materials on order of a contractor performing a construction contract for the United States on a cost-plus basis, where, under the contract, the contractor and not the Government is the purchaser of the materials, notwithstanding that the tax is passed on to the Government by reason of the cost-plus provisions of the contract.

Alabama v. King and Boozer, 86 Adv. Op. 1; 62 Sup. Ct. Rep. 43; U. S. Law Week 4020. (Decided November 10, 1941.)

This case presented for decision the question whether the Alabama sales tax, with which a seller is chargeable, but which he is required to collect from the buyer, infringes any constitutional immunity of the United States from state taxation, as construed and applied here.

The respondents, King and Boozer, sold lumber on the order of contractors for use by the latter in constructing an army camp for the United States. The contractors were working under a "cost-plus-a-fixed-fee" contract with the United States.

The statute imposes a 2% tax on the gross retail sales price of personal property. The tax is laid on the seller who is required to add it to the sales price. The statute excludes from the tax proceeds of sales which the state is prohibited from taxing by the Constitution or laws of the United States. The Supreme Court of Alabama ruled that the tax here was, in effect, laid on a transaction by which the United States secures things desired for governmental purposes so as to infringe the constitutional immunity protecting the United States from taxation by the states.

On certiorari, this ruling was reversed by the Supreme Court in an opinion by MR. CHIEF JUSTICE STONE. At the outset, he observes that Congress has declined to pass legislation immunizing from state taxation contractors under "cost-plus" contracts for the construction of governmental projects, and that the question involved is simply whether the constitutional immunity forbids the imposition of the tax on the proceeds of the sale in question.

The Government's contention was that the tax is invalid because its legal incidence is on the Government rather than on the contractors who ordered and paid for the lumber. To resolve this contention it was necessary to consider the provisions of the entire contract.

As to who is purchaser, the opinion states that it seems plain that under the statute the purchaser is the person who orders and pays for the goods when the sale is for cash, or who is legally obligated to pay for them when the sale is on credit. Under this test, the Government contended that the purchase was sufficiently a Government purchase to come within the immunity.

The Court, however, rejects this contention. The opinion recognizes that under the "cost-plus" contract, the contractors undertake to furnish, among other things, such materials as are not furnished by the Government, and to do all things necessary to complete the work. In consideration of this undertaking, the Government agrees to pay a fixed fee and to reimburse the contractors for specified expenses including expenditures for materials and state or local taxes, which the contractors are required to pay on account of their contract. It is recognized further that under the contract title to the materials in question is vested in the Government upon their delivery at the site of the work and upon written acceptance of the Contracting Officer. Moreover, the contract provides that all contracts made by the contractors for materials in excess of $2,000 must be assignable to the Government, but the contractors must make the contract in their own name and may not bind or purport to bind the Government. Furthermore, the Government exercises extensive control over all purchases made the contractor.

Notwithstanding these provisions, the Court reaches the conclusion that the contractor and not the Government is the purchaser. In reaching this decision, emphasis is placed on the fact that the contractor, rather than the Government, is obligated to pay the purchase price. In this connection, MR. CHIEF JUSTICE STONE says:

> We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber within the meaning of the taxing statute, and as such were subject to the tax. They were not relieved of the liability to pay the tax either because the contractors in a loose and general sense were acting for the Government in purchasing the lumber or, as the Alabama Supreme Court seems to have thought, because the economic burden of the tax imposed upon the purchaser would be shifted to the Government by reason of its contract to reimburse the contractors.
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> We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price, or that the contractors were not the purchasers on whom the statute lays the tax. The added circumstance that they were bound by their contract to furnish the purchased material to the Government and entitled to be reimbursed by it for the cost, including the tax, no more results in an infringement of the Government immunity than did the tax laid upon the contractor's gross receipts from the Government in *James v. Dravo Contracting Co.*

No. 603, *Curry vs. United States*, is a companion case to *Alabama vs. King and Boozer*, and involves the validity of the Alabama use tax on materials brought into the state and appropriated by a contractor for use under a Governmental cost-plus contract. For the reasons stated in the opinion in the *King and Boozer case*, the use tax was also sustained as to materials brought into the state and stored or used therein by contractors in connection with the performance of their contracts for the United States under cost-plus contracts.

MR. CHIEF JUSTICE STONE delivered the opinion in this case also.

MR. JUSTICE JACKSON did not participate in the decision of either No. 602 or No. 603.

The cases were argued on October 23 and 24, 1941 by Mr. Acting Solicitor General Fahy for respondents and by Mr. Thomas S. Lawson and Mr. John W. Lapsley for petitioners.

Taxation—Sales Taxes—Application to Sales to Federal Land Banks

Under Section 26 of the Federal Farm Loan Act of 1916, Federal Land Banks are exempt from state sales taxes in respect of materials purchased by them for the repair of properties acquired by them through foreclosure, or otherwise, in the course of their lending operations. Congress may constitutionally grant to the banks, as federal instrumentalities, immunity from state taxation in respect of the exercise of the various powers granted to the banks.

Federal Land Bank of St. Paul v. Bismarck Lumber Co., 86 Adv. Op. 46; 62 Sup. Ct. Rep. 1; U. S. Law Week, 4003. (No. 76, decided November 10, 1941.)

The question for decision here was whether Section 26 of the Federal Farm Loan Act exempts the petitioner, Federal Land Bank of St. Paul, from the North Dakota sales tax, in respect of the bank's expenditures on farm properties acquired through foreclosure in the course of the Bank's lending operations. The tax in question was claimed to be due in respect of the Bank's purchase of some materials for the purpose of making repairs and improvements on the properties.

This general question was considered in two aspects by the Supreme Court in its decision reversing the Supreme Court of North Dakota, which had sustained the validity of the tax. These aspects were: (1) does Section 26 of the Farm Loan Act exempt the sales in question; and (2) can Congress constitutionally immunize from state taxation activities of the Federal Land Banks in furtherance of their lending functions.

Both of these questions were answered affirmatively.

The opinion of the Court was delivered by MR. JUSTICE MURPHY. No great difficulty was found in reaching a conclusion as to the first question, and both the broad terms of Section 26 and its legislative history were relied upon to support exemption of the transaction from the tax.

As to the constitutional question, the respondents contended that Congress has authority to grant tax immunity only in respect of the governmental functions of the land banks, and not to their lending functions which are essentially private in character. This argument the Court rejects for reasons which MR. JUSTICE MURPHY states, as follows:

> The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the federal government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. . . . It also follows that when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental. . . . The federal land banks are constitutionally created . . . and respondents do not urge otherwise. Through the land banks the federal government makes possible the extension of credit on liberal terms to farm borrowers. As part of their general lending functions the land banks are authorized to foreclose their mortgages and to purchase the real estate at the resulting sale. They are "instrumentalities of the federal government engaged in the performance of an important governmental function". . . . The national farm loan associations, the local co-operative organizations of borrowers through which the land banks make loans to individuals, are also federal instrumentalities. . . .
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> Congress has the power to protect the instrumentalities which it has constitutionally created. This conclusion follows naturally from the express grant of power to Congress "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the Government of the United States. Const. Art. I, Sec. 8, par. 18". . . . We have held on three occasions that Congress has authority to prescribe tax immunity for activities connected with, or in furtherance of, the lending functions of federal credit agencies. *Smith v. Kansas City Title & Trust Co., supra; Federal Land Bank v. Crosland*, 261, U. S. 374; *Pittman v. Home Owners' Loan Corp., supra.* The first two of these cases dealt with the very section 26 now in issue. They are conclusive here.

MR. JUSTICE JACKSON took no part in the decision of this case.

The case was argued on October 23, 1941 by Mr. Warner W. Gardner for the petitioner and by Mr. P. O. Sathre for the respondents.

Relationship of State and Federal Courts—Federal Employees' Liability Act—Venue

A state court may not exercise its equitable jurisdiction to enjoin a resident of that state from prosecuting a cause of action arising under the Federal Employers' Liability Act in a Federal court of another state where the act gives venue on the ground that prosecution in the Federal court is inequitable, vexatious and harassing to the carrier.

Baltimore & Ohio Railroad Co. v. Kepner, 86 Adv. Op. 37; 62 Sup. Ct. Rep. 6; U. S. Law Week, 4011. (No. 20, decided November 10, 1941.)

Certiorari was granted in this case to review a decision of the Supreme Court of Ohio dismissing an action by the Baltimore and Ohio Railroad Company to enjoin prosecution in the Federal district court for the Eastern District of New York, where the railroad was doing business, of an action under the Federal Employers' Liability Act by an injured employee who resided in Ohio where the accident occurred, and where the railroad and the witnesses were available for process. The Ohio decision was based upon the theory that the employee was privileged to enjoy without state court interference the venue allowed by § 6 of the Federal Employers' Liability Act which provides that an action under it may be brought in a Federal district court

"in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." This decision had been affirmed by the Supreme Court by an equal division of the court, and rehearing had then been allowed.

The Court's opinion, after rehearing, was delivered by MR. JUSTICE REED, and affirms the holding of the Ohio court. It first examines the history of the legislation in question, pointing out that originally the act had required actions under it to be brought in districts in which the defendant was an inhabitant, and that the amendment permitting suit wherever the defendant was doing business was added after litigation had shown deficiencies in the right of employees to bring personal injury actions under it.

"The reason for the addition was said to be the injustice to an injured employee of compelling him to go to the possibly far distant place of habitation of the defendant carrier with consequent increased expense for the transportation and maintenance of witnesses, lawyers and parties away from their homes . . . The language finally adopted must have been deliberately chosen to enable the plaintiff, in the words of Senator Borah, who submitted the report on the bill, 'to find the corporation at any point or place or State where it is actually carrying on business, and there lodge his action, if he chooses to do so!' "

The opinion then eliminates consideration of the question whether the suit in New York would create an inadmissible burden on interstate commerce, pointing out that no objection on this ground appeared in the petition for certiorari, and restating the general doctrine that the carrier must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened.

It then proceeds to the contention that despite the admitted venue, the employee is acting in a vexatious and inequitable manner in maintaining the Federal court suit in a distant jurisdiction when a convenient and suitable forum is at hand. It admits the abstract power of the Ohio court to prevent a resident under its jurisdiction from doing inequity; but points out that the allowance or denial of the venue privilege created by the act is a matter of Federal law, and the state court action must be in accord with the Federal rule rather than state rule or policy, and concludes:

> There is no occasion to distinguish between the power and the propriety of its exercise in this instance since the limits of the two are here co-extensive. The privilege was granted because the general venue provisions worked injustices to employees. It is obvious that no state statute could vary the venue and we think equally true that no state court may interfere with the privilege, for the benefit of the carrier or the national transportation system, on the ground of inequity based on cost, inconvenience or harassment. . . . A privilege of venue granted by the legislative body which created this right of action cannot be frustrated for reasons of convenience or expense. If it is deemed unjust, the remedy is legislative, a course followed in securing the amendment of April 5, 1910, for the benefit of employees. . . . Whatever burden there is here upon the railroad because of inconvenience or cost does not outweigh the plain grant of privilege for suit in New York.

MR. JUSTICE FRANKFURTER, joined by MR. CHIEF JUSTICE STONE, and MR. JUSTICE ROBERTS, dissented. The rationale of the dissent is stated in the following quotations:

> The problem is whether the Act was intended to give a plaintiff an absolute and unqualified right to compel trial of his action in any of the specified places he chooses, thereby not only depriving state courts of their old power to protect against unjustly oppressive foreign suits, but also forbidding federal courts to decline jurisdiction "in the interest of justice" on familiar grounds of *forum non conveniens*. . . . Nothing in the history of the 1910 amendment indicates that its framers contemplated any such vast transformation in the established relationship between federal and state courts and in the duty of the federal courts to decline jurisdiction "in the interest of justice". On the contrary, the expressed considerations of policy underlying the amendment were fundamentally the same as those underlying the equitable power to restrain oppressive suits and the reciprocal doctrine of *forum non conveniens*. It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensating fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties. * * *
>
> To read the venue provision of the Act as do the majority of the Court is to translate the permission given a plaintiff to enter courts previously closed to him into a withdrawal from the state courts of power historically exercised by them, and into an absolute direction to the specified federal and state courts to take jurisdiction. . . . The long history of leaving the effective enforcement of federal rights to state courts has proceeded on recognition of the power of the state courts to exercise in the first instance their settled doctrines of law and equity. The opinion of the Court ignores these settled principles. In an area demanding the utmost judicial circumspection, dislocating uncertainty is thereby introduced. * * *
>
> Surely it is much more consonant with reason and right to read venue provisions in the familiar context of established law rather than to impute to Congress an unconsidered, profound alteration in the relationship between the federal and state courts and in the relations of the federal courts *inter se*.

The case was argued on April 2nd and 3rd, 1941, and reargued on October 20, 1941, by Mr. Harry H. Bryer and Mr. Morison R. Waite for petitioner and by Mr. Samuel T. Gaines for respondent.

Bankruptcy Appeals—Power of C.C.A. to Recall Mandate After Term—Finality of Bankruptcy Court Orders When Not Appealed in Time

Bernards v. Johnson, 86 Adv. Op. 14; 62 Sup. Ct. Rep. 30; U. S. Law Week, 4015. (No. 2, decided November 10, 1941.)

Certiorari was granted here to determine questions of appellate practice under § 75 of the Bankruptcy Act. The opinion by MR. JUSTICE ROBERTS first states at length the complicated facts of the case. The first question raised related to the power of the circuit court of appeals to recall its mandate in order to correct an erroneous decision. Its judgment affirming the district court had been rendered at its October 1938 term. Its mandate had been stayed at that term to allow an application for certiorari which was later denied. The stay had not ended nor the mandate issued until the term had expired. An application to recall the mandate pending

Supreme Court decision of related cases, had been presented within the following term, during which the mandate went down. It was argued that the circuit court lacked authority, after the term in which judgment was rendered, to recall its mandate and amend its judgment in matters of substance. The opinion holds that the circuit court by staying the issuance of the mandate and retaining the case until after the opening of the subsequent term had in effect extended the term for that case and, therefore, had power to recall its mandate and reconsider the appeal during the term in which the stay expired and the mandate issued.

The second point raises question as to the degree of finality of orders of the district court and the conciliation commissioner, if they are erroneous, when review or appeal was not sought or taken in time. As to this, the opinion concludes that the circuit court of appeals was correct in its holding that the challenged orders were final, binding and impregnable to subsequent attack since review or appeal was not sought or taken within the time allowed by court rule or by law.

The third point relates to the jurisdiction of a state court to proceed with foreclosures and invest mortgage creditors, as purchasers at execution sales, with valid title to mortgaged lands in view of the automatic stay of subsection (0) of the Bankruptcy Act and the extension of the period of redemption created by subsection (N). The opinion finds that this question need not be decided because the orders of the bankruptcy court which expressly permitted the mortgagees here to pursue their foreclosure suits, were not appealed in time, and no matter how erroneous they might be, the remedy for their correction was by timely application for review or by timely appeal, and since the district court had refused to review the orders out of time, they could not be attacked in the circuit court of appeals.

The case was argued on December 11, 1940 and reargued on October 14, 1941, by Mr. William Lemke for petitioners and by Mr. William Brewster and Mr. H. G. Platt for respondents.

Patents—Thermostatically Controlled Cigar Lighter—"Invention"

The Cuno Engineering Corp. v. Automatic Devices Corp., 86 Adv. Op. 62 Sup. Ct. Rep. 37; U. S. Law Week 4005. (No. 37, decided November 10, 1941.)

The Automatic Devices Corp. v. Sinko Tool & Manufacturing Co., 86 Adv. Op. 27, 62 Sup. Ct. Rep. 42; U. S. Law Week, 4007. (No. 6, decided November 10, 1941.)

Writs of certiorari were granted to resolve conflicting decisions of the circuit courts of appeals of the second and seventh circuits as to the validity of certain claims of the Mead patent for improvements in lighters used in automobiles for cigars, cigarettes and pipes, involving the use of a thermostatic control responsive to the temperature of a heating coil, by which the lighter is turned off after the heating coil has reached the proper temperature.

The opinion in No. 37 by MR. JUSTICE DOUGLAS, reviews the prior art in detail, both as to thermostatic heating controls and as to non-thermostatic electric cigar lighters, and concludes that the Mead device was not patentable since it was not the result of invention but was merely the exercise of the ingenuity of a mechanic skilled in his calling, and was an advance plainly indicated by the prior art.

MR. JUSTICE STONE, joined by MR. JUSTICE FRANKFURTER, concurred in the result. The concurring opinion particularly emphasizes that the case is not one for application of the doctrine that commercial success or the manifest satisfaction of a felt need will even the scale in favor of invention, because the commercially successful device for which the protection of the Mead patent was claimed is not the same as the structure described by Mead.

The opinion in No. 6, by MR. JUSTICE DOUGLAS, merely disposes of that case by reference to the reasons stated in No. 37.

The cases were argued on October 22nd and 23, 1941, by Mr. Drury W. Cooper for the petitioner in No. 6 and by Mr. Russell Wiles and Mr. Bernard A. Schroeder for the respondent in No. 6; and by Mr. Robert Starr Allyn and Mr. Carlton Hill for petitioner in No. 37 and by Mr. Drury W. Cooper for the respondent in No. 37.

Charles Fahy Appointed Solicitor General

On October 30 President Roosevelt nominated Charles Fahy to be Solicitor General of the United States, and his nomination was confirmed by the Senate on November 13. He succeeds Francis Biddle, now Attorney General.

Fahy, who is forty-nine years of age, has been Acting Solicitor General, and prior to that was Assistant Solicitor General for about a year. He was general counsel of the National Labor Relations Board for five years, and there won a number of notable victories before the Supreme Court.

He is a native of Rome, Georgia. He studied at Notre Dame University and later Georgetown Law School. He was an aviator during the World War and won the Naval Cross. He practiced law in Washington, D. C., until 1924, when he moved to Santa Fe, New Mexico, and he practiced his profession there until 1933, when he returned to Washington to become Assistant Solicitor for the Department of the Interior.

Mr. Fahy has been a member of the American Bar Association since 1930.

Two years after he became Counsel for the N.L.R.B., the place of that Board had been fully sustained by the Supreme Court. On a single day the Court upheld the Wagner Act and in four other decisions gave the Board the enforcement power which Fahy contended it must have under the law.

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Our Stewardship

ONE of the chief objectives of the American Bar Association, and therefore of its JOURNAL, is service to the Judicial Institution, its ministers and servants, and to all those charged with the administration of justice.

The obligation to act justly rests on every one; but the responsibility of ensuring and enforcing justice, and resisting and redressing injustice, rests equally on the executive and the judicial departments of government. The functions of the executive department are not here discussed. To the judicial department has been delegated the hearing and adjudication of controversies concerning rights and obligations and the enforcement of those adjudications when made. The work of the judicial department has been delegated to four principal instrumentalities; first, the judicial tribunals; second, the members of the bar; third, the administrative agencies, so far as they decide controversies; fourth, the teaching branch of the legal profession. These four instrumentalities constitute the judicial institution. So far as any of them fail, justice falls short of full realization.

The judicial tribunal is the greatest invention of mankind in the effort to provide a substitute for force in the settlement of controversies, whether between man and man or between the citizen and the government. So far as the courts render that impartial and impersonal arbitrament which has become the ideal of free men everywhere, men have ceased to resort to force and have chosen the judicial tribunals for the settlement of their rights.

The lawyer is an essential part of the judicial institution and he is rightly termed an officer of the court, for no judge could be sure of the justice of a claim or defense without the aid of counsel on each side learned in the law and familiar with the issues of fact in controversy.

Before the beginning of this century it was deemed advisable to invoke the aid of administrative agencies "in order to get things done." Those agencies have to deal with rights and obligations, they hear evidence, find facts, interpret and apply law, and thus in a real sense administer justice. They are also charged with the grave responsibilities of courts, to hear patiently and render impartial justice according to law. To the extent that these duties partake of judicial character, the help of lawyers is as necessary to them as it is to the courts and the rights of a litigant to be heard by counsel of his own choice is as essential as it is in the courts.

And finally the man who has dedicated himself to the study and teaching of law is entitled to recognition with all others who participate in the administration of justice. Without teachers possessing wisdom and the power of its practical application to the daily affairs of men, the coming generation of lawyers would be inadequately equipped for the service to which they may aspire, the practicing lawyer would be compelled to carry a vastly heavier burden of research and the judge himself would be less fortified for the performance of his high office. The Association from its first beginnings has been committed to the belief that the teacher of law is an indispensable element in the development of jurisprudence as a science, and that but for him the law would not be entitled to be called a learned profession.

The JOURNAL seeks to serve in full and equal measure every one of these instrumentalities—the courts, the bar, the administrative agencies and the teachers of the law.

The JOURNAL was established to afford to the Association, its duly constituted authorities the Assembly and House of Delegates, its sections, committees, its affiliated organizations, the state and local bar associations, the organized bar in general, and the individual lawyer, a medium for the dissemination of legal ideas, a report of the activities of the profession, and a record of current legal history.

While the JOURNAL is the voice of the Association, loyal to its declared purposes and objectives, not every subject on which lawyers think and debate can be discussed in the limited space which its columns afford. Those must be given priority in which, by action of the Assembly and House of Delegates, policies have been declared and lines of action indicated.

As to all other material, preference will be given to that which seems to promise the edification and interest of its readers.

A Resolve Worthy of Our Best Efforts

THE "open forum" sessions of the Assembly of the American Bar Association fulfill a two-fold purpose, in giving to individual members an assured opportunity to offer and debate resolutions expressing their

personal views, and also in providing the means of bringing about at times a crystallization and significant declaration of the Association's objectives and policy on matters of public moment.

In the natural course, many of these individual formulations could not prudently be acted on by the Assembly until their tenor and text have been studied and reported on, by the Committee or Section which has their particular subject-matter under consideration and can examine the particular resolution against the background of integrated policy. On the other hand, resolutions are from time to time introduced which, when heard and pondered by the representative Committee on Resolutions, are seen clearly to constitute important and timely declarations on matters on which members of the Association have deep and earnest convictions.

In the latter category was the trenchant Resolution offered in Indianapolis by Loyd Wright, of Los Angeles, reported favorably by the Resolutions Committee headed by Ex-Judge Hatton W. Sumners, Chairman of the House of Representatives Committee on the Judiciary, and adopted unanimously by each the Assembly and the House of Delegates:

> "WHEREAS, The subordination of any branch of our constituted form of government to any other branch is destructive to our constitutional form of government; now therefore, be it
>
> "RESOLVED, That the American Bar Association reaffirm its unalterable faith in the balanced form of government as established by the Constitution of the United States—a legislative, an executive, and a judicial branch, each independent of the others, and no one dominated by either of the others; and be it further
>
> "RESOLVED, That the American Bar Association recommends that each state, county, and local association disseminate information in their respective localities and initiate programs calculated fully to advise the citizens of their respective communities, the necessity of preserving our American institutions and our constitutional form of government."

Here is a ringing declaration of the Association's "unalterable faith in the balanced form of government as established by the Constitution of the United States." Here is a spirited reiteration of the necessary independence of each of the three branches of government—no one branch "dominated by either of the others".

At the same session, the Assembly decisively rejected several resolutions which attacked the conduct of the foreign policy of the United States in the present crisis. Beyond question, the American Bar Association adheres to its historic faith in a law-abiding, law-governed world in which force and arbitrary power, in the hands of nations or individuals, have been overcome and the orderly processes of peace, justice, law and the observance of human rights, are supreme. The resolution adopted in Indianapolis was thus plainly directed to domestic policies.

The Resolution implements its declaration of faith by a program of action to make it effective. The unanimous voice of the Assembly and the House has endorsed that avowal of faith and sponsored that program for action. Each State and local Bar Association, and each lawyer in his home community, ought to do all in their power to give support and strength to this timely course of action.

Sustaining Members

IN this number will be found a statement of the new plan adopted by the Assembly and House of Delegates in relation to sustaining membership. That plan seeks to make the burden lighter for those who have so generously contributed, and to invite a larger participation in the effort to make it financially possible to undertake important work for the Association which has heretofore been beyond our means.

Our present income enables us to provide for our indispensable activities, but there are so many other important things which we ought to do, that an increase of dues has been seriously considered. It has however been decided not to adopt that policy now, because there are so many of our members to whom an increase of dues would be a burden. There are however, men who have repeatedly demonstrated their willingness to make voluntary contributions, so that greater service can be rendered to all the men of our profession.

A few of the responsibilities which should be prosecuted on a larger scale than our present resources present, are the following:

The efforts being made to render this country invulnerable to attack, and to give aid to those whose efforts greatly reduce the probability of our participation in armed conflict, call on us to enlarge the scope of our committee on National defense.

Our efforts to improve the administration of justice must be continued and adequately supported.

The work of Public Relations can not even be rightly begun without large expenditures of money and effort. An adequately financed program to let the public know what lawyers have done and are doing, will pay large dividends.

Each of our sections and most of our committees are greatly increasing their usefulness. They should be enabled to increase it still more.

If *every lawyer to whom his profession has been kind,* becomes a "sustaining member" we would easily be equipped with financial resources which would enable us to accomplish great results.

Section of Legal Education and Admissions to the Bar

THIS brief summary of this year's activities of the Section of Legal Education and Admissions to the Bar may give some idea of the extent of the activities for which this Section has the responsibility.

A careful inspection of ten (10) petitioning Law Schools resulted in full approval being granted to two (2) and provisional approval to five (5) others. Steps have been developed in conjunction with the Association of American Law Schools to procure from all approved schools regular reports to the end that conformity with the standards of the American Bar Association may be continuously maintained and periodic inspections made of such approved schools, as may appear to be deficient in the quality of legal education being given under approval.

During the past year the impact of the draft resulted in serious depletion of enrollment of all law schools. A complete survey was made to secure all the facts in an endeavor to work out some solution that will permit continuity of legal education during the emergency period and in this connection close liaison with the Selective Service Administration was at all times maintained.

Advanced Legal Education, along the lines formulated by the Section, has become a permanent part of the Bar program of 30 states, serving real educational need for both the larger cities and rural communities. The Institute program is here to stay. During the past year some of the Law Schools have made available to the advanced legal education committee, the services of outstanding faculty members without charge.

Representatives have now been appointed in all of the states, furnishing immediate contact between the Council of the Section and the existing local agencies through which the activities of the Section must be promoted.

The Committee on Cooperation between Bar Associations, Law Schools and Boards of Law Examiners has functioned effectively and is now engaged in studying proposals looking toward a standard bar examination service which will do much to bring continuity into the entire program of legal education.

Considerable progress in the past year was made in the six (6) remaining states of the nation which do not yet require two (2) years of college training as a prerequisite for admission to the bar. Data has been gathered on existing and proposed apprenticeship and sponsorship systems, in order that out of the experience of some of the states where this has been tried, effective recommendations can be made.

A publication of the Section, "Choosing a Law School," met with enthusiastic response and a third printing was required.

In all, the past year has been one of extreme activity and accomplishment for that part of the American Bar Association program for which this Section is responsible.

W. E. STANLEY,
Retiring Chairman

Section of Judicial Administration

THE Section of Judicial Administration cooperated at Indianapolis with the National Conference of Judicial Councils in a joint program. Under the particular auspices of the National Conference was the very interesting debate to a crowded house on the afternoon of Monday, September 29, between Attorney General Francis Biddle and former Dean Roscoe Pound concerning certain features of administrative tribunals. The joint dinner on Monday evening was most successful. Judge Edward R. Finch, Chairman of the National Conference, presided at the dinner. The large number attending were delighted by the addresses of Hon. D. L. McCarthy, President of the Canadian Bar Association, Sir Norman Birkett, of the bar of England, and Hon. William L. Vandeventer, of Springfield, Missouri.

The program on Tuesday morning in the auditorium of the World War Memorial was under the particular auspices of the Section of Judicial Administration. Hon. Jacob M. Lashly, President of A. B. A., presided at this session. The program was made up of four addresses: "Improvement of the Administration of Justice," by Senior Circuit Judge John J. Parker of the Fourth Circuit Court of Appeals; "Selection of Judges," by Judge Laurance M. Hyde, Commissioner of the Supreme Court of Missouri; "How to Achieve Improvement in the Administration of Justice," by Justice George Rossman of the Supreme Court of Oregon; "Comment to the Jury by the Trial Judge," by Judge Merrill E. Otis.

At the business meeting of the Section, Justice George Rossman of Oregon was elected Vice-Chairman for 1941-1942. Under the by-laws he will succeed as Chairman in 1942-1943. Judge Van Buren Perry of South Dakota was re-elected Secretary. Hon. Arthur T. Vanderbilt was re-elected to the Council. New members elected to the Council were Hon. James P. Alexander, Chief Justice of the Supreme Court of Texas, and Hon. Royal A. Stone, Associate Justice, Supreme Court of Minnesota. At a Council meeting the work for the coming year was mapped out. That work chiefly will concern the Judge-Jury Relation in state and federal courts.

MERRILL E. OTIS,
Chairman

Section of Real Property, Probate and Trust Law

THE Section of Real Property, Probate and Trust Law at the Annual convention adhered to its program as published in the program of the sixty-fourth annual meeting.

The sessions were well attended, the audience being the largest which the Section has had up to this time. The papers presented were of uniformly high quality. The discussions which followed indicated broad interest in the subjects by the program. The entire program of the Section was confined to problems confronting lawyers in the present hour. The general theme of the meetings was the effect of the present war economy upon law. Carrying out this theme, discussions ranged from the dislocations caused by the drafting of the country's man power, through the problems created by priorities and government price control, to those forward-looking problems, such as inflation, which will confront the practicing lawyer during the coming months. The Section was so fortunate as to have various aspects of its program presented by such eminent speakers as the Under Secretary of War, Judge Robert Patterson; Hon. Hatton W. Sumners, Gen. Lewis B. Hershey, Director of Selective Service; Abner Ferguson, Federal Housing Administrator; Leon H. Keyserling, Deputy Administrator and General Counsel of United States Housing Authority, and Harold Lee, General Counsel of the Federal Home Loan Bank Board. Other lawyers of national reputation contributed.

Probably the highest spot of a splendid program was the annual dinner of the Section which was addressed by the Under Secretary of War and by Judge Sumners. An audience of several hundred was electrified by their important and sincere messages.

The interest of the members of the Section in the papers presented at the Section meetings and at meetings of its three divisions of Real Property, Probate and Trust Law has resulted in so many requests for copies that the Section will have to consider the possibility of distributing some of them even prior to the publication of its proceedings.

By action of the Section the House of Delegates was requested to refer to the National Conference of Commissioners on Uniform State Laws three of the papers presented with the recommendation that the Conference be requested to consider the desirability of preparing drafts of uniform laws to embody the suggestions contained in the papers. All three were prepared by members of the Section's Committee on Changes in Substantive Real Property Principles. They are:

"Perpetuity, Rule against Perpetuity, Codification of Both" by William F. Bruell of South Dakota;

"Desirability of Statutory Recognition of the Doctrine of Cy-pres in Construing Charitable Trusts" by Henry Upson Sims of Alabama and George E. Beers of Connecticut;

"Abolishing Possibilities of Reverter after Lapse of Time" by Judge Charles E. Clark, of Connecticut.

HAROLD L. REEVE,
Chairman

Section of Insurance Law

THE impact of the war on insurance was highlighted from several different angles at the sessions of the Section on Insurance Law. The "Effect of Freezing Foreign Funds on Insurance Companies" was the formal title of an address delivered by Edward H. Foley, Jr., General Counsel to the Treasury Department at the first general session. In fact Mr. Foley confined himself to an exposition of general background explaining that he had found the subject so involved that the Treasury Department had decided to call in company representatives for joint discussion before answering the many legal questions which have arisen. Members of the Section will receive copies of these answers when they are issued.

What happens to insurance under a "shooting war" on the other hand was lucidly portrayed at the second general session by John G. Foster, member of the Inner Temple, London, and presently Legal Adviser to the British Embassy at Washington, D. C. Speaking on "British Insurance and Wartime Economy," Mr. Foster covered both the activities of the private carriers and the various governmental schemes devised to meet the extraordinary losses attributable to bombs, shells, and torpedoes.

"Insurance Activities of the United States Maritime Commission" was explained by Byram K. Ogden, Director, Division of Insurance of the U. S. Maritime Commission before the Round Table on Maritime and Inland Maritime Insurance Law, while "Life Insurance War Problems" were being presented to the Life Insurance Law Round Table by W. Colquitt Carter of Atlanta, Georgia, and just a short time after those present at the Fire Insurance Law Round Table had listened to Frank L. Erion, of Chicago, discuss "Law Adjustment Problems Incident to War and Defense Measures." Still another aspect of the defense situation was covered by Major Allen Wight, of Dallas, Texas, who addressed the Fidelity and Surety Insurance Law Round Table groups on "Federal Assignment of Claims Act of 1940."

Despite this understandable emphasis on war subjects, lively discussions on current insurance law topics continued as in former years to occupy much of the time in the ten Round Table groups. Typical of the papers read was "Changes in Standard Provisions of Automobile Liability Policy" by Harry W. Raymond, of Chicago, which helped to attract an overflow audience at the Automobile Insurance Law Round Table. The changes in question will be incorporated in this year's pocket part supplement to Insurance Policy Annotations, Vol. I, which is a bound volume possessed by every Section member annotating the standard

automobile policy as well as the standard fire policy line by line. Some twenty other papers of similar practical and current interest were delivered and debated and will appear in the Section's proceedings for the year.

HOWARD SPENCER,
Chairman

Section of Commercial Law

THE Section of Commercial Law had an outstanding meeting at Indianapolis, and presented the most extensive program which has been prepared for any annual meeting since the Section was organized three years ago. The sessions extended over a day and a half and the two most significant events were the joint meeting with the Sections on Municipal Law, and Taxation, on the subject of Sales and Use Taxes, and the very important open forum on H.R.4394, the new Bankruptcy Administration Bill, which was introduced in Congress last spring.

At the mid-winter meeting of the House of Delegates, this Section was authorized to request that Congress delay action on this Bill until it could be publicized and fully studied by the lawyers, referees, and judges throughout the country. Carrying out this mandate, the Section secured extensive publicity in the AMERICAN BAR ASSOCIATION JOURNAL and other legal publications, provided witnesses who testified before the Bankruptcy Sub-Committee of the House, conferred with Congressional leaders on this important measure, and when the Sub-Committee reported the Bill back to the full Judiciary Committee, without recommendation, the Section was successful in obtaining postponement of further action until after the annual meeting of the Association.

Our Tuesday afternoon session was devoted entirely to a discussion of the Bill. Hon. Francis M. Shea and Mr. Charles A. Horsky, Chairman and Director, respectively, of the Attorney General's Committee on Bankruptcy Administration, Hon. Henry P. Chandler, Director of the Administrative Office of the United States Courts, Hon. Benjamin Wham, President of the Illinois Bar Association, various federal judges, chairmen of bankruptcy committees of the state bar associations, Referees in Bankruptcy and leading lawyers in this field, spoke both for and against the various provisions of this Bill. At the conclusion of the meeting, a resolution was passed, which was subsequently approved by the House of Delegates, that the American Bar Association should oppose the passage of this Bill in its present form and that the Section of Commercial Law should continue to work with the proper authorities to suggest various amendments to this Bill. Any such amendments will be reported back to the House of Delegates at its mid-winter meeting next March.

The joint session on Sales and Use Taxes brought leading authorities on this subject from the fields of Taxation, and Municipal, and Business Law. It was a distinguished meeting capably conducted by Robert A. B. Cook of Boston. The discussion later by Randolph Paul of New York City, Professor Robert C. Brown of Bloomington, Indiana, and Richard Capel Beckett of Chicago, were supplemented by outstanding practitioners in the taxation field, and a very comprehensive treatise on Sales and Use Taxes was presented by Henry Clyde Johnson of the Boston Bar.

At the Tuesday morning session, splendid papers were presented on the subjects of Conditional Sales Contracts, Negotiable Instruments, Corporate Reorganizations, and State Court Receiverships.

During the business session of the Section, the officers, John M. Niehaus, Jr., Chairman; W. Leslie Miller, Vice Chairman; J. Kemp Bartlett, Jr., Secretary, were re-elected for the ensuing year, and Benjamin Wham of Chicago, John Gerdes of New York, and Raymond G. Young of Omaha, were elected to the Council.

All of the papers presented at the various sessions, as well as a full report of the general discussion on Sales and Use Taxes and the Bankruptcy Administration Bill, will be included in the booklet of the Section, which will shortly be distributed to all of its members.

JOHN M. NIEHAUS, JR.,
Chairman

Section of Taxation

EXHAUSTING the seating capacity of an Indianapolis hotel, the Section of Taxation put in a full day discussing several committee's proposals for amending federal tax statutes. Section members also spent one afternoon in joint "round table" with the Sections of Commercial Law and of Real Property, Probate and Trust Law on sales and use taxes and a second afternoon with the Municipal Law Section and the Real Property Section at a round table on real property taxation.

Lunching jointly with the Municipal Law Section and the Real Property Section, the Section members heard the United States Treasury's Assistant Secretary, John L. Sullivan, discuss the co-ordination of federal, state and local taxes. At its morning session on September 30, the Section interrupted its legislative debates to hear Mr. Randolph E. Paul discuss some of the Supreme Court's recent "changes of mind".

The Section meeting approved twelve recommendations for legislative changes. These were subsequently all approved by the House of Delegates. They will be presented to the appropriate committees and agencies of the Congress when discussions on the next tax bill start.

Heretofore the Section's work in state and local taxation has been undertaken by one committee on state taxation and one on local taxation. This impractical arrangement will be replaced by five new committees. These are committees on: (1) State and Local Property Taxes; (2) State and Local Income Taxes; (3) State and Local Death and Gift Taxes; (4) State and Local Sales

and Use Taxes; (5) State and Local Franchise and Miscellaneous Taxes.

In order that the 1150 members the Section has acquired in two years may know more about each other, the Section determined to publish a biographical register of all members of the Section on January 1, 1942. This is evidence that this Section, as have other Sections, is approaching a sort of bar association entity of its own.

GEORGE M. MORRIS,
Chairman

Section of Mineral Law

THE Section of Mineral Law conducted meetings on Monday afternoon and throughout the day Tuesday, September 29 and 30. At the Monday meeting reports of oil, coal and gas committees were submitted and discussed, and a paper was read by Borden Burr, of Birmingham, Alabama, on the subject "Section Seven of the Fair Labor Standard Act of 1938 as Applicable to the Mining Industry".

The by-laws of the Mineral Section were amended by unanimous vote of the Section whereby the retiring chairman was made a member of the council ex-officio, the council of the Section having previously approved the amendment.

On Tuesday morning papers were read and discussions had on questions involved in the coal industry. Mr. Herbert J. Jacoby of New York, read a paper entitled "Review of Court Decisions under the Bituminous Coal Act of 1937". Mr. Hammond E. Chaffets read a paper entitled "Regulation of the Coal Industry During War Times". Mr. Philip Price of Philadelphia, read a paper on "Authority of the Commission to Fix Prices at Destination".

The afternoon meeting was devoted to problems of the oil industry. A paper was read by former Under-Secretary of the Interior, Alvin J. Wirtz, and following him, the Governor of Oklahoma, Hon. Leon C. Phillips, read a paper entitled, "Advantages of State Control of the Petroleum Industry".

Four members of the council were elected to fill vacancies, and James T. Finlen, Esq., of Butte, Montana, was elected as chairman of the Section. J. V. Norman was re-elected vice-chairman, and Peter Q. Nyce, of Washington, was re-elected secretary.

ALVIN RICHARDS,
Chairman

National Conference of Judicial Councils

AS Chairman of the National Conference of Judicial Councils, I comply with the request of the Editor-in-Chief of the AMERICAN BAR ASSOCIATION JOURNAL to submit a short summary of proceedings of the meetings held in conjunction with the Section of Judicial Administration of the American Bar Association.

The underlying objective of these Sections is the improvement in the administration of justice. Obviously, an immediate step were the bills pending at the Congress submitted by the majority and minority of the Attorney General's Committee on Administrative Agencies. The work of these Sections is submitted for evaluation upon service rendered to the members of the Bar. To this end, the Attorney General of the United States, the Honorable Francis Biddle and Dr. Roscoe Pound, Dean Emeritus of the Law School of Harvard University, explained in noteworthy addresses the provisions of the pending legislation based upon the admirable and thorough-going report of the Attorney General's Committee. The American Bar Association will furnish to the readers of the AMERICAN BAR ASSOCIATION JOURNAL a copy of these addresses. The attendance at the meeting was overwhelming and more than justified the unselfish service rendered to the members of the Bar by the Attorney General and Dean Pound.

On Monday evening, some 600 members of these Sections gathered to hear addresses by D. L. McCarthy, K.C., President of the Canadian Bar Association, Sir Norman Birkett, K.C., a leader of the English Bar and Honorable William L. Vandeventer, noted orator and raconteur.

Tuesday morning, Honorable John J. Parker, Presiding Justice of the Fourth Circuit Court of Appeals, brought before the Section in a memorable address, the outstanding progress which has been made towards bringing into accord the procedure in the state and Federal courts with particular consideration to the new Federal rules. Unusual appreciation has been expressed by all members of the great accomplishment wrought by the Special Committee of which Judge Parker is Chairman.

"Selection of Judges," a subject of the utmost importance, was presented in a memorable address by Honorable Laurance M. Hyde, Commissioner of the Missouri Supreme Court, with particular reference not only to the plan adopted in California, but to the success in adopting the plan in Missouri which is based on the plan adopted by the American Bar Association.

The important subject of "Comments to the Jury by Trial Judge" was considered in an excellent address by United States Judge Merrill E. Otis, of Kansas City, Missouri. This subject becomes of unusual interest because of the attempts recently made to interfere in this regard with the due administration of justice. The session was concluded by Judge George Rossman of the Supreme Court of Oregon, in an address which will long be remembered, entitled "How to Achieve Improvement in the Administration of Justice."

The attendance at all of the sessions was outstanding. The members of the Association note with particular appreciation the large number of the Judiciary who are contributing service to the improvement of the administration of justice, for which they, on account of their daily experience, have opportunity for observation and the power to make them peculiarly fitted.

EDWARD R. FINCH,
Chairman

HOUSE OF DELEGATES MEETING, INDIANAPOLIS

FIRST SESSION

The opening session of the House of Delegates was devoted in large part to the consideration and adoption of numerous proposed amendments to the Constitution and By-Laws of the Association and the Rules of Procedure of the House. A proposal to increase the annual dues of members was rejected. Association finances and sustaining memberships received consideration, and the incorporation of the proposed American Bar Association Endowment was authorized. The Association's program for improving the administration of justice was assured the Association's continued support. The Committee on National Defense gave an interesting and notable report. A recommendation by the Committee on Jurisprudence and Law Reform was approved by the House.

THE first session of the House of Delegates, as a part of the Sixty-Fourth Annual Meeting of the Association, was called to order by President Jacob M. Lashly, in the commodious Assembly Room of the Claypool Hotel, in Indianapolis, on Monday afternoon, September 29. After greeting the delegates, President Lashly turned the gavel over to Thomas B. Gay of Virginia, Chairman of the House of Delegates.

Roll Call

Roll call showed a large and representative attendance. Those members of the House who attended the sessions were:

ALABAMA	Martin, William Logan
ARIZONA	Byrne, Theron J. Craig, Jubal Early
ARKANSAS	Arnold, William H. Dobyns, A. W.
CALIFORNIA	Beardsley, Charles A. Brenner, James Crump, Guy Richards Warren, Earl Williams, Ernest S. Wright, Loyd
COLORADO	Blount, G. Dexter Denious, Wilbur F. Wallbank, Stanley T. Woods, James A.
CONNECTICUT	Berry, Joseph F. Lyman, Charles M.
DELAWARE	Morford, James R. Poole, William
DISTRICT OF COLUMBIA	Bastian, Walter M. Chandler, Henry P. Hannah, Paul F. Morris, George M. Quinn, Henry I. Sutton, Loyd H. Vallance, William Roy Vance, John T.
FLORIDA	Fowler, Cody
GEORGIA	Powell, Arthur Gray Slaton, John M. Tye, John L., Jr.
IDAHO	Haga, Oliver O. Thomas, Clarence W.
ILLINOIS	Gregory, Tappan Hale, William B. Harno, Albert J. Heyl, Clarence W. Niehaus, John M., Jr. Reeve, Harold L. Stephens, R. Allan Tolman, Edgar B. Trimble, Cairo A.
INDIANA	Bredell, Harold H. O'Byrne, Roscoe C. Robinson, James J. Wilde, Carl
IOWA	Guthrie, Thomas J. Miller, Frederic M. Stipp, Harley H. Thompson, Burt J.
KANSAS	Faulconer, Albert Stanley, W. E.
KENTUCKY	Drake, Frank M.
LOUISIANA	Dunbar, Charles E., Jr.
MAINE	Haskell, Frank H. Robinson, Clement F.
MARYLAND	Fisher, Samuel J. Markell, Charles Mason, E. Paul
MASSACHUSETTS	Avery, Nathan P. Grinnell, Frank O'Connell, Joseph F. Welch, Joseph N.
MICHIGAN	Essery, Carl V. Gillespie, Glenn C. Hull, Oscar C. Planck, Joseph W. Stone, Ferris D.
MINNESOTA	Burns, John A. Mitchell, Morris B. Youngquist, G. Aaron
MISSISSIPPI	Lipscomb, Hubert S. Welch, W. S.
MISSOURI	Anderson, Roscoe Barker, John T. Foulis, Ronald J. Fry, W. Wallace Hyde, Laurance M. Lashly, Jacob M. McDonald, Thomas F.
MONTANA	Jameson, W. J.
NEBRASKA	Berry, Frederick S. Mothersead, James G.
NEVADA	Cantwell, Charles A. Summerfield, Lester D.
NEW HAMPSHIRE	Snow, Conrad E. Wyman, Louis E.
NEW JERSEY	Carey, Robert Ford, L. Stanley Smith, Sylvester, C., Jr. Vanderbilt, Arthur T.
NEW MEXICO	Reese, George L.
NEW YORK	Bates, Harry Cole Bond, George H. Chanler, William C. Clark, John Kirkland Ransom, William L. Spencer, Howard C. Strong, Charles H. Wickser, Philip J.
NORTH CAROLINA	Hutchins, Fred S. Shepherd, Harold Smith, Willis
NORTH DAKOTA	Bronson, Harrison A.
OHIO	Barkdull, Howard L. Davenport, Leroy B. Fredriks, Gerritt, J. Racine, Charles W. Seasongood, Murray
OKLAHOMA	Cantrell, John H. Duvall, Felix C. Keaton, James R. Richards, Alvin
OREGON	Lewis, Arthur H. Maguire, Robert F. Teiser, Sidney
PENNSYLVANIA	Gernerd, Frederick B. Henderson, Joseph W. Knight, Harry S. Mason, William Clarke Milholland, James Myers, Bernard J.
PUERTO RICO	Soldevila, Ismael
RHODE ISLAND	Hart, Henry C. Wheeler, Chauncey E.
SOUTH CAROLINA	Buist, George L. Cain, Pinckney L. Moore, B. Allston

SOUTH DAKOTA	Bruell, William F. Voorhees, John H. Willy, Roy E.
TENNESSEE	Armstrong, Walter P. Long, Mitchell
TEXAS	Lawther, Harry P. Rouer, Rhinehart E. Shepherd, James L., Jr. Simmons, David A. Storey, R. G. Thompson, Will C.
UTAH	Judd, Robert L. Musser, Burton W.
VERMONT	Fitts, Osmer C. Moulton, Sherman R.
VIRGINIA	Campbell, Stuart B. Gay, Thomas B. Gibson, George D. Powell, Lewis F., Jr.
WASHINGTON	Hamblen, Laurence R. Helsell, Frank P. Metzler, Hugo
WEST VIRGINIA	Haymond, Frank C. Jackson, Thomas B.
WISCONSIN	Oestreich, Otto A. Quarles, Charles B. Rix, Carl B.
WYOMING	Kinsley, H. Glenn Wilson, William O.
TERRITORIAL GROUP	Lockwood, L. Dean (Philippine Islands)

The House got down to its business quickly. Chairman Morris B. Mitchell, of Minnesota, gave the report of the Committee on Credentials, as to delegates of state and local bar associations certified to the House since the mid-winter meeting. The record of the mid-year proceedings of the House was formally approved.

George L. Buist, of South Carolina, called attention to the death of Judge Alva M. Lumpkin, State Delegate from South Carolina, who had died within a few days after his appointment to the Senate of the United States. Sylvester C. Smith, Jr., of New Jersey, noted the passing also of Judge Jesse A. Miller, State Delegate from Iowa, who was killed in a motor accident last summer. The appointment of committees to prepare and present memorials was authorized by the House.

Reports as to Association Finances

Treasurer John H. Voorhees, of South Dakota, in giving his report, referred first to the change in the plan of budgeting expenditures by Sections and committees so as to coincide with the Association year, which runs from the adjournment of each annual meeting rather than the fiscal year which applies to other Association expenditures. For the fiscal year (ended June 30, 1941) he reported $219,852.68 as total receipts from annual dues, $12,217.50 as receipts from sustaining membership dues, and a total so-called direct income of $286,418.55 from all sources, which includes Section dues for Section purposes. The expenditures approved to September 23 amounted to $266,902.15, which left an amount of $19,516.20 as a balance subject to various further readjustments incident to the transition to the new plan of budgeting for committees and Sections. The report of the independent auditors as to the Association's finances will be found in the 1941 Annual Report volume.

Treasurer Voorhees reported that the Association membership as of July 1, 1939 was 31,880; as of July 1, 1940, 31,626; and as of July 1, 1941, 30,834.

After the report had been received, Chairman Carl B. Rix of the Budget Committee reported "a balanced budget" for the past year, and noted that the so-called "profit" for the fiscal year ended June 30, 1941, was about $6800. Under the new plan, whereby expenditures by Sections and committees are brought forward to the end of the Association year, further deductions to date for unexpended appropriations had brought this down to $3872.45, with possibility of going lower. Chairman Rix adverted to some $24,000 of unanticipated emergency expenditures for national defense and other purposes, and to the problems thereby created. "We are restricted from spending money," he said, "unless we know that we have it. The budget could not have been balanced without the aid of $12,000 from the sustaining memberships. Mr. Barkdull and his committee are entitled to a tremendous amount of credit. Fortunately, we have come through these years with no impairment of surplus."

Chairman Rix asked the active help of every member of the House and the Association in obtaining new members for the Association, to take the place of those who at present are dropping out for reasons which reflect no waning of interest. The reports of Treasurer Voorhees and Chairman Rix evoked hearty applause, in appreciation of hard work done by them and their associates.

Secretary Knight Reports for Board of Governors

Secretary Harry S. Knight gave a supplemental report by the Board of Governors as to matters acted upon by the Board since the last meeting of the House. Among other things, he said,

"At the May meeting, a special Committee on Advancement and Coordination of National Defense was created. Judge Thomas D. Thacher of New York City accepted its chairmanship. In June the committee made an analysis of the Hobbs Alien Deportation Bill, and submitted its analysis, together with the recommendation that the legislation should receive the full support of the legal profession. By mail vote, the Board of Governors, with certain slight changes, approved the recommendation of the Thacher Committee.

"In August, the Board of Governors had called to its attention that Judge Thacher's committee was created for the purpose not only of sponsoring federal legislation which the committee considered to be for the public good, but that it was also the duty of the committee to oppose federal legislation which the committee considered inimical to the public interest.

"The letter calling this to the attention of the President was mailed to the several members of the Board, each of whom gave his opinion in detail as to whether this Committee on Advancement and Coordination of National Defense should act both to oppose federal legislation which was considered inimical to the public interest, and to support that which was considered beneficial; in short, whether the committee should act as a brake as well as a dynamo on so-called defense legislation. No vote was taken by the Board upon this

proposal. All of the opinions crystallized in letters from members were turned over to the Thacher committee. The Board in session at Indianapolis determined that the scope of the committee was not to be enlarged."

Letter from Former Chief Justice Hughes

Secretary Knight also said that former Chief Justice Charles Evans Hughes, also a former president of the Association, had, in reply to a letter written to him by President Lashly upon the retirement of the Chief Justice, referred with interest to the part he has taken in the American Bar Association, and said that he leaves with the Association his hopes that the Association may exert a constantly widening influence in promoting the high ideals of our profession.

GUY RICHARDS CRUMP

Chairman, House of Delegates

Secretary Knight also brought it to the attention of the House that the Section of Commercial Law, in pursuance of the authority given to it, appeared, through its chairman, before the Committee of the House of Representatives with regard to the Bankruptcy Administration Bill, H. R. 4394, which provides for certain changes in the bankruptcy act, in some instances for centralized control, and would change the compensation of referees in bankruptcy, details of which appeared in the April issue of the JOURNAL. The chairman of the Section requested that a further opportunity for study of the problems should be given to the bar and to business men and suggested that the matter be not hastened. The bill is still under consideration.

Report of Cooperation with the FBI

Report was further made that "During the past year the message of the work and operation of the Association was carried on by the members of the Board of Governors and officers to eighty-five law schools throughout the country," also that "the Board of Governors, at the request of the Federal Bureau of Investigation, with the assistance of the Committee on National Defense, has cooperated with and is cooperating with the FBI in different parts of the country in investigating subversive activities."

The report of the Editor-in-Chief of the JOURNAL, Major Tolman, to the Board of Governors, was cited as showing that the JOURNAL advertising is now at its highest for all time, and is still on the increase.

The report of the Board asked attention to the fact that in 1941 mail-ballot elections of State Delegates, only about 40 per cent of the eligible members of the Association sent in their ballots. In 1941 there were few contests for the office of State Delegate, so that only one name appeared on the ballot in most of the states. It was suggested that members of the House interest themselves in bringing about the polling of a larger vote, under the Association's democratic electoral system.

Other matters reported on by the Board of Governors were stated to be reserved until the same came up for action by the House. The report given by the Secretary was approved and adopted by the House.

Report and Action on Amendments of Constitution and By-Laws

Chairman Chauncey B. Wheeler, of Rhode Island, reported for the Committee on Rules and Calendar, of which the other members were Messrs. Armstrong, of Tennessee, Bond of New York, Crump of California and Morris, of the District of Columbia. The text of the filed amendments was before the House in the Advance Program pamphlet as well as in the JOURNAL. The committee had held hearings, to which the proponents of amendments were invited. Most of the amendments were minor and formal in character, to meet and provide for situations developed under the Association's Constitution and By-Laws as adopted in Boston in 1936. With respect to each of the proposed amendments, Chairman Gay directed, and the Secretary made, the appropriate notations to show due and timely publication and notice, the presence of more than the required number of delegates, and a vote according to the requirement.

The first amendment was designed to save expense in the printing of nominations for State Delegate. It was filed at the suggestion of the Board of Elections, headed by Judge Edward T. Fairchild, of the Supreme Court of Wisconsin. As recommended by the Committee on Rules and Calendar (with a slight change in verbiage from that filed and pub-

lished), the proposal was that Article V, Section 5, of the Constitution be amended by deleting the second sentence thereof, which reads as follows:

> The Board of Elections shall thereupon cause each nomination and the names of the signers of such petition, to be published in the next issue of the AMERICAN BAR ASSOCIATION JOURNAL.

and by substituting therefor the following sentence:

> The Board of Elections shall thereupon cause the name of each nominee, and the names of the signers of his nominating petition, not exceeding a total of fifty such names, to be published in the next issue of the AMERICAN BAR ASSOCIATION JOURNAL.

The above amendment was unanimously adopted by the House, subject to concurrence by the Assembly, which later adopted the amendment.

Vacancies in the Office of State Delegate

The second amendment reported on by Chairman Wheeler also involves amendment to Article V, Section 5 of the Constitution, as to the filling of vacancies in the office of State Delegate occasioned otherwise than by the failure of a State Delegate to register in attendance at the annual meeting. Under the existing provisions, "it has happened that where a State Delegate has failed to register on the opening day of the annual meeting, the members in attendance from his state have failed to elect a successor, with the result that under the election machinery it is not possible to elect a successor until some date approximately sixty days before the next annual meeting. This means that the state is not represented at the succeeding meeting of the State Delegates for the nomination of officers."

The Rules and Calendar Committee reported that "We feel that the existing provisions of the Constitution to the effect that in case of failure to register at the annual meeting, the members in attendance from the state in question may select a successor, are adequate. We feel that this provision should not be changed because it puts pressure upon state delegates to attend the annual meetings, and thus helps to keep the House of Delegates a live, active body. On the other hand, the reasons for this provision are not applicable when a vacancy occurs by resignation or death."

Text of the Amendment as Adopted

To accomplish these purposes, the committee recommended that the filed amendment, with its text slightly changed for clarity, be adopted, so that the provisions in Article V, Section 5, beginning at line 51, should read as follows:

> If a State Delegate shall fail to register in attendance at any annual meeting of the Association by twelve o'clock noon on the opening day thereof, the office of such State Delegate shall be deemed to be vacant; and thereupon the members of the Association present at the meeting from his state (or the territorial group) shall convene and elect a successor to serve until the vacancy shall be filled by nomination and election as hereinabove provided. In case there shall exist any vacancy in the office of State Delegate caused otherwise than by failure of the State Delegate to register at any annual meeting as aforesaid, the President of the Association, the member of the Board of Governors from the judicial circuit and the remaining members of the House of Delegates from the state in which the vacancy exists, shall elect in such manner as shall be determined by the Chairman of the House of Delegates a successor to serve until the vacancy shall be filled by nomination and election as hereinabove provided, and said Chairman, immediately upon learning of any such vacancy, shall be charged with the duty of carrying this provision into effect. In any case, when a vacancy shall have been filled by nomination and election as aforesaid, the nominated and elected successor shall serve for the unexpired term.

Questions as to Application of the Amendment

When the adoption of the amendment had been moved, John Kirkland Clark, of New York, asked that action be laid over until all members of the House could have before them, and could study, the textual changes from the filed form. The motion to defer was lost, on a rising vote of the House.

Mr. Frederic Miller, of Iowa, asked, as to the proposed amendment,

> Is it the opinion of the committee that it would be imperfectly done if a delegate failed to register and a delegate from that state failed to fill the vacancy—would that be a vacancy caused otherwise than by failure to register? It seems to me that such a vacancy should be filled in the manner specified here.

Chairman Wheeler responded that his own view, and probably that of the committee was that,

> in that particular case, the vacancy could not be filled by the method which we have suggested; and the reason for that is that we feel that the present constitutional provisions with respect to filling of vacancies and the penalty that ensues from failing to fill when a delegate does not attend the annual meeting are proper; they are hard, but probably on the whole for the best interest of this Association and the House of Delegates.

The amendment was then adopted by the House, in the form recommended by the Committee. The Assembly later adopted the same wording.

Vacancies in Elective Membership of the Board of Governors

Chairman Wheeler next reported as to the filed amendment of Article VI, Section 1 of the Constitution, which relates to the filling of vacancies in the office of an elective member of the Board of Governors. The present provision was stated to be that if the office of an elective member of the Board of Governors shall become vacant, such vacancy can be filled only after nomination by the State Delegates, or by nominating petition, and election by the House of Delegates on the first day of its annual meeting. If the vacancy occurs before a nominating meeting of the State Delegates, the vacancy cannot be filled until the succeeding annual meeting. If the vacancy occurs after a nominating meeting of the State Delegates, the vacancy can be filled only at the second succeeding annual meeting, or possibly at the annual meeting following the creation of the vacancy, upon nominations made by petition as provided in Section 2 of Article VIII.

The committee felt that this situation should be corrected so as to permit a prompt filling of the vacancy for a temporary period.

Test of the Amendment as Adopted

Accordingly, the committee recommended that Article VI, Section 1 of the Constitution be amended by striking out, in lines 8 to 11 thereof, the sentence reading,

> If the office of an elective member of

> the Board of Governors shall become vacant, such office shall be filled for the unexpired term, by election as herein provided.

and inserting in lieu thereof the following:

> If the office of an elective member of the Board of Governors shall become vacant, such office shall be filled for the unexpired term, by election, as herein provided, and until such election shall be held and a successor shall have been qualified, such vacancy shall be filled by a person chosen by the President of the Association and the members of the House of Delegates from the judicial circuit in which the vacancy exists, in such manner as shall be determined by the Chairman of the House of Delegates. Said Chairman, immediately upon learning of the existence of any such vacancy, shall be charged with the duty of carrying this provision into effect.

Debate as to the Committee's Proposal

Chairman Wheeler moved the adoption of the foregoing, which was the wording of the amendent as filed. John T. Barker, of Missouri, asked questions as to who would initiate the filling of a vacancy. Chairman Wheeler replied that,

"The language is that the President of the Association and the members of the House of Delegates from the judicial circuit in which the vacancy exists shall choose the successor, temporarily, in such manner as should be determined by the Chairman of the House, and that the Chairman of the House is directed and charged with the duty of carrying the provision into effect."

Mr. Barker: "Let us say there is a vacancy, and there are five states. They might have in the big states fifteen or twenty members. They are to select one man under supervision of the Chairman of the House. What does that mean?"

Mr. Wheeler: "That means to me that the President and those persons who are mentioned as members from this judicial circuit will get together and in some fashion hold a meeting. They could do it by a meeting and elect a successor temporarily; I suppose in case there were only a few, it could be done by mail . . . "

Mr. Barker: "Would it not be better to let the President name the man himself for that short term, without getting involved in all that intricate machinery?"

Mr. Wheeler: "If the question is directed to me, the answer is no. I am saying that because I have given it much consideration and the committee has given it much consideration. The feeling is that, after all, this should be done in connection with the members of the circuit, and that everyone should have something to say in connection with filling the vacancy."

A Satisfactory Method for Filling the Vacancy Temporarily

John M. Niehaus, Jr., of Illinois, asked: "Haven't you now injected the President of the Association into the selection of this interim member, where the normal election for a full term is so conducted that the President has nothing to say about it?"

Chairman Wheeler replied, "I think that is true."

Mr. Niehaus: "What was the thought back of this amendment?"

Chairman Gay: "The Chair would like to state that the State Delegates now nominate a member of the Board of Governors and this House elects. The President has a vote in the House as a member of the House. This will confine the election to the State Delegates and the State Bar Association of a member of the House in that circuit."

Mr. Niehaus: "Isn't that true now? I wanted to know what influenced the committee in injecting the President into it as they have."

Chairman Wheeler: "We were trying to find some reasonably satisfactory method for filling such a vacancy temporarily, and I realized that there might be different schemes suggested. There were. All we had in mind was to set up some machinery that was not too cumbersome under which a vacancy could be filled and by people in whom the House would have the utmost confidence."

The filed amendment was then put to a vote of the House and adopted, with the later concurrence of the Assembly.

Recommendations by Sections as to Proposed Legislation

In view of the emergence of Sections as sources from which emanate many important recommendations for Association action as to legislation, the next proposal sought an amendment of the By-Laws, so as to make applicable to Sections such a provision as is contained in Article X, Section 20, of the By-Laws, as to Committees. Accordingly, the filed amendment proposed to add to Article XII of the By-Laws a new section to read as follows:

> Section 6. *Reports of Sections.* All Sections shall have their reports printed, or otherwise duplicated, and distributed to members of the House of Delegates (unless otherwise ordered by the House) before action thereon is taken by the House of Delegates. Whenever legislation is proposed, reports containing recommendations for action by the House of Delegates shall be accompanied by a draft of a bill embodying the views of the Section. All Section recommendations shall be accompanied by a statement of the reasons therefor. Recommendations of a Section or of the National Conference of Commissioners on Uniform State Laws may be acted upon at any meeting of the House of Delegates immediately following or held contemporaneously with a meeting of the Section or Conference.

The House, by vote, amended the By-Laws as above shown, and the Assembly later took the same action.

The fifth proposal for amendment was of a formal character, and was necessitated by the previous amendment. It involved an amendment of Section 20 of the By-Laws by eliminating the provisions of that section, relative to the time for consideration of reports of Sections. The committee recommended that Article X, Section 20, of the By-Laws be amended by substituting a period for the semicolon after the word "submitted" in the thirteenth line, and striking out the balance of Section 20. This was adopted by vote of the House, with the later concurrence of the Assembly.

Presentation of Minority Views before the House

The sixth and seventh proposals for amendments related to the Rules of Procedure of the House itself. They had their origin in the following resolution, offered by Joseph F. O'Connell, of Boston, and adopted at the Philadelphia meeting:

> Resolved, that there be referred to the Committee on Rules and Calendar a study of the rules directing them to re-

port to this House the possible revision of the rules of the House which will provide a rule for presentation of minority views in connection with any section or committee report before any action is taken on said report.

It was stated by the committee that under the provisions of Section 2 of Rule VII of the Rules of Procedure of the House, it was provided that a chairman of a standing or special committee of the Association may have the privileges of the floor without vote, and may speak or make a motion only concerning any report of his committee or other matter within the jurisdiction or his committee. It is provided in Section 3 of the same rule that no non-member of the House (except chairmen of Association committees) shall be heard by the House unless upon motion of a member and the unanimous vote of the House. There is no specific provision permitting a member of a committee, other than the chairman, to appear before the House except by unanimous vote. If such a member of a committee desires to present minority views, he could not do so under the existing rules except by such unanimous action.

Text of the Change in the Rules of the House

Chairman Wheeler reported that "The Committee on Rules and Calendar feels that there is occasion for a change of the rules of the House so as to remedy this situation. The committee feels that the matter would be covered adequately if a representative of the minority were permitted the privileges of the floor without vote in those cases where a minority report has been filed."

Accordingly, the committee recommended that Rule VII, paragraph 2 of the Rules of Procedure of the House of Delegates be amended by adding at the end thereof the following:

> When a minority report has been filed in connection with a committee or Section report, one representative of the minority, selected by the minority for that purpose, shall have the privileges of the floor, without vote, to speak once, not to exceed ten minutes, upon the question.

The committee recommended also that Rule VII, paragraph 3, of the Rules of Procedure of the House of Delegates be amended by inserting in line 7 thereof, after the word "committees" the following:

> or persons presenting minority reports of committees or Sections,

so that the last sentence of that paragraph, as amended, shall read as follows:

> No non-member of the House (except chairmen of Association committees or persons presenting minority reports of committees or Sections) shall be heard by the House, unless upon motion of a member and the unanimous vote of the House.

On motion by Chairman Wheeler, the House adopted the above amendments of its Rules of Procedure, which thereby became effective.

Proposals to Amend the By-Laws as to Life Memberships and Dues

Next considered were several proposals to amend the By-Laws which had been filed by Messrs. Howard L. Barkdull, Harold J. Gallagher, Morris B. Mitchell, William O. Reeder, and Floyd E. Thompson, as members of the Ways and Means Committee, relating to life memberships, sustaining memberships, and Association dues.

The first of these proposals, as filed, would amend Article I, Section 3 of the By-Laws so as to provide that persons becoming life members should have paid regular dues for a period of twenty-five years and so as to require the payment of $125.00 for such life membership. Chairman Wheeler reported that this "has been considered carefully, not only by members of your committee, but also by the Board of Governors, who have advised us that they believe that the eligibility requirement for life membership should be the payment of dues for ten years rather than twenty-five years, and that the life membership dues should be $150.00 instead of $125.00. We understand that the proponents concur in the changes mentioned, and your committee also concurs."

Text of the Amendment as to Life Members

The committee therefore recommended that Article I, Section 3, of the By-Laws be amended by striking therefrom the words, "any person eligible for membership in the Association and elected as above provided, and," and the words, "heretofore elected," and by adding after the words, "any member of the Association" the words, "who shall have paid regular dues for a period of ten years;" and by striking the figures "$100" and inserting in lieu thereof the figures "$150"; so that Section 3 would read as follows:

> Section 3. *Life Membership.* Any member of the Association who shall have paid regular dues for a period of ten years, may become a life member of the Association upon written notice to the Treasurer and payment of the sum of $150 for such life membership. Such payment when made shall be in full of all dues to the Association during the life of such member. A life member shall have all the privileges of an active member of the Association. All sums paid for life membership in the Association shall be invested by the Treasurer; and the income therefrom shall be used for the general purposes of the Association unless otherwise provided by further amendment hereof.

Chairman Wheeler moved that Article I, Section 3 of the By-Laws be amended as read.

Mr. James L. Shepherd, Jr., of Texas, said that "I understand that the life membership dues which are paid under the amendment would be invested and that only the income therefrom would be available for the expenses of this Association. It seems to me that it is poor policy for this Association to run the risk of having a large number of members go on a life membership basis where only the income would be available for the expenses of this Association currently."

Debate as to Desirability of the Change

L. R. Hamblen, of Washington, thought that the last sentence of the amendment would be "a saving clause." Mr. Wheeler declared that "The general purpose of the amendment was to make it a little bit harder to become a life member of the Association because at the present time, under the By-Laws, the dues or the payment for life membership is $100 and it is now provided that any person eligible for membership may become a life member upon payment of that sum."

Philip J. Wickser, of New York,

member of the Board of Governors and of the Budget Committee, said that

> I think it is correct to assume that life memberships should be amortized and the scale of membership was figured out fairly carefully so that it amounts to amortization, but, in direct answer to the point made, I wish to point out first that after the $125 gets into capital, it stays there forever; therefore, from any individual you are going to get a good deal more in the long run, and as the life members die, their capital stays and still earns whatever the interest yield may be, so that in the aggregate you probably get more, and I think you almost do today. We have $3700 in the fund, and I think something like fifty life members.
>
> Secondly, the reason that the amortizing provision was not inserted is that it involves complicated bookkeeping. Until the matter gets on a volume basis such as you suggested, it is a good deal of bookkeeping, so that if the amount that we should amortize in a given year is not amortized as a bookkeeping matter, we have simply compelled ourselves to save a few dollars of our own income.

Mr. Barker of Missouri Asks Questions

Mr. Barker, of Missouri, asked, "May I ask the chairman of the committee another question? This ten years' payment of dues before a man can become a life member—does that mean ten continuous years? We will say a person has paid five years' dues and dropped out five years, and come back—have you got that covered, Mr. Wheeler?"

Mr. Wheeler: "Well, the language is, 'Any member of the Association who shall have paid regular dues for a period of ten years.' "

Mr. Barker: "Can a man drop out five years, come back for five years more, and then become a life member?"

Mr. Wheeler: "I would think so."

Ex-Judge Harry P. Lawther, of Texas, moved to insert the word "consecutive." Sylvester C. Smith, Jr., of New Jersey, opposed this insertion as unneeded for actuarial reasons. L. Stanley Ford, Jr., also of New Jersey, opposed Judge Lawther's motion because "it would be an unfair hardship upon those of our members who happen to be called into service of the United States, and thereby suspend their membership for one, two, three years, or for the duration of the war."

The amendment offered by Judge Lawther was put to a vote and rejected. In answer to a question by Mr. Shepherd, of Texas, the Secretary stated that the Association now has 52 life members. By vote of the House, the By-Laws were then amended in the above-stated form, recommended by the Committee on Rules and Calendar. The Assembly later took the same action.

Provision for a Changed Status of Sustaining Memberships

The next proposal was for an amendment of Article I of the By-Laws, to create a separate class of sustaining membership in the Association, with annual dues of $25.00, in lieu of regular dues. The recommendation of the Committee, approved by the Board of Governors, was to add a new section, numbered four, to Article I of the By-Laws, to read as follows:

> Section 4: *Sustaining Membership.* Any person eligible for membership in the Association and elected as above provided, and any member of the Association heretofore elected, may become a sustaining member of the Association upon written notice to the Treasurer and payment of the sum of $25.00 dues for each year from July first to June thirtieth following, payable on July first of each year in advance, which sum shall include the regular Association dues and the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, which is $1.50 per year. Any sustaining member may become a regular member of the Association upon written notice to the Treasurer before July first of any year, and shall thereafter pay only the regular dues as provided by Article II, Section 1.

Explanation of Change as to Sustaining Memberships

Chairman Howard L. Barkdull, of Ohio, for the Ways and Means Committee, explained that "the real purpose of this amendment is to place sustaining memberships on a regular basis, so that if a man signs or notifies the Association to the effect that he desires to become a sustaining member, he will continue to be billed at the rate of twenty-five dollars a year until such time as he notifies the Association that instead of twenty-five dollars a year sustaining membership dues, he wishes to revert to the eight-dollar-a-year regular dues."

In response to a question by John Kirkland Clark, of New York, Chairman Wheeler stated that no provision was being submitted for sustaining membership dues on a life (commuted) basis. The motion to adopt the amendment of the By-Laws was carried then by the House, and later by the Assembly. As a formal matter in view of the foregoing, the House voted to change the number of sections 4 and 5, of Article I, to Sections 5 and 6, respectively. This action also was taken later by the Assembly.

Proposal to Increase Annual Dues Is Debated and Rejected

The amendment next considered would have increased the annual dues of the Association members from eight to ten dollars a year, and the dues of junior members from four to five dollars a year, during their first five years after admission to the bar. This had been filed by the Committee on Ways and Means; the Board of Governors and the Committee on Rules and Calendar each recommended that it be not adopted, under present and prospective conditions.

"During our present sustaining membership campaign," declared Chairman Barkdull of the Ways and Means Committee, "the members of this Association said to us—not once, not twice, but dozens and hundreds of times—that we should stop passing the hat, and we say to you that there is a belief on the part of a large number of members of this Association that we should carry on our activities out of our regular income, that we should either increase our income, our regular income, or reduce the volume of our activities."

Chairman Barkdull said that he and his associates do not urge that dues be increased "provided it is not necessary to go out on an emergency campaign to the membership" to obtain contributions or put on pressure for sustaining memberships. He indicated that an increase in dues "may be necessary in the future, if you do not get out of the regular and sustaining memberships the amount of money that is necessary to pay the

expenses of this Association."

Chairman Wheeler's motion that the amendment to increase the dues be not adopted was then carried by vote of the House. Later the Assembly took a like action.

As a formal matter, by reason of the actions already voted, Chairman Wheeler moved that Article II, Section 4 of the By-Laws be amended by striking out the word "Honorary" and inserting in lieu thereof the word "Special" in the title, and by adding after the word "honorary" in the text, the words "life and sustaining," so that Section 4 shall read as follows:

> Section 4. *Special Members.* This article shall not apply to honorary, life, and sustaining members of the Association or to members who have been placed on the special list pursuant to Section 5 of Article I of the By-Laws.

This amendment was voted by the House, with concurrence later by the Assembly.

Also on motion of Chairman Wheeler, Section 9 of Article II of the By-Laws was repealed by vote of the House, with later concurrence by the Assembly. This action was voted in view of the adoption of a By-Law to create a separate class of sustaining members.

Action on Judge Lawther's Amendment Is Deferred

The concluding item on the long list of filed amendments was the recurring proposal by Ex-Judge Harry P. Lawther, of Texas. Concerning it the Committee on Rules and Calendar reported, in part:

> In substance, it would do away with the present system of nominations of officers of the Association (including the Chairman of the House of Delegates) and members of the Board of Governors by state delegates, and it would also eliminate the existing provisions of the Constitution permitting other nominations by petition so that members of the Association, other than members of the House of Delegates, would not be permitted to nominate by petition as they are now permitted to do.
>
> In place of the existing provisions, all nominations would be initiated merely by petition signed by ten members of the House of Delegates with respect to officers, and five members of the House of Delegates with respect to nominations for Board of Governors. The thought behind the proponent of this proposal is that the existing Constitutional provisions unfairly prevent any participation in the nominating process by members of the House of Delegates, other than State Delegates.
>
> The members of your committee discussed this proposed amendment at great length yesterday, not only with Mr. Lawther but with many members of the Association who are active in its affairs. Your committee feels that the proposal is so far-reaching in its scope and would so completely change the underlying theory of nominations contained in the present constitution that it should not be adopted, in any event, without further study of the whole subject. Following yesterday's discussion, Mr. Lawther and other members of the Association who participated in the discussions agreed that such further study is necessary.
>
> Therefore, your committee recommends that the amendment to the constitution proposed by Harry P. Lawther be not adopted at this time; and that the Committee on Rules and Calendar be directed to study further said proposed amendment and the related subject matter having to do with the method of nomination and election of officers and members of the Board of Governors of the Association, and to prepare and propose such amendments as it may deem advisable for consideration and action at the next annual meeting; and that in connection with such study, said committee be authorized to request the aid and assistance of other members of the House of Delegates, including Messrs. Harry P. Lawther, Carl B. Rix, William L. Ransom, and Arthur T. Vanderbilt.

With obvious relief at the avoidance of long debate, the members of the House voted approval of the committee's recommendation, in which the Assembly later concurred.

Election of Members of Board of Governors

Having concluded its long consideration of the detailed and relatively minor amendments, the House took up the election of members of the Board of Governors. The Secretary presented his certification of the nominations duly made by the State Delegates. No other nominations having been made, the following were put to a separate vote, upon motion of ex-Judge Keaton, of Oklahoma, and in each instance were elected:

> First judicial circuit, to fill the vacancy caused by the death of George R. Grant, Frank W. Grinnell, of Massachusetts; Fourth judicial circuit, Willis Smith, of North Carolina; Eighth judicial circuit, Morris B. Mitchell, of Minnesota; Seventh judicial circuit, Floyd E. Thompson, of Illinois.

Resolutions Offered for Reference to Committee on Draft

The next order of business was the offering of resolutions by the individual members of the House, for reference to and report by the Committee on Draft. The first resolution was by Murray Seasongood, of Ohio:

> At the first meeting of the House of Delegates following the retirement of Chief Justice of the United States Charles E. Hughes, this House expresses its profound admiration for the public services rendered by him in the administration of justice and otherwise, and its good wishes for many more years of fruitful effort for the public good.

Mr. Seasongood offered also the following:

> Resolved, that there be and hereby is created a special committee of the American Bar Association on Civil Service.

Report by Committee on National Defense

The first committee report called for was that on National Defense, presented by Edmund R. Beckwith, of New York. After expressing his appreciation of the whole-hearted cooperation which the committee has received from all officers and agencies of the Association, as well as the public, Colonel Beckwith referred to the fortunate fact that, when the committee began its work, "there was set up, at President Lashly's instigation, what we have informally called the advisory group to this committee, consisting now, as it has through the year, of one man appointed by the Secretary of War, one man by the Admiral who is Judge Advocate General of the Navy, one by the Major General who is Judge Advocate General of the Army, one from the Selective Service, and one from the Department of Justice."

Through its chairman, the House gave Colonel Beckwith permission to present to the House the chairman of this advisory group, Colonel Archibald King, of the United States Army, Chief of the War Plans Section of the Judge Advocate General's Department, a member of the bar of the District of Columbia and of this Association. Colonel King was warmly greeted, as he acknowledged the honor of the presentation, and paid tribute to "the great amount of work

of very high quality done by Mr. Beckwith with the rest of his committee."

Chairman Beckwith also introduced to the House, by special permission, the Honorable Lawrence M. C. Smith, Assistant to the United States Attorney General on the Defense Unit of the Department of Justice, also a member of this association and of the advisory group. In responding to the hearty applause in recognition of his presence at the Association's meeting, Mr. Smith said that "I hope you will give support to the work of Mr. Beckwith's committee. I think it is very essential to our defense program."

Chairman Beckwith Corrects Two Misapprehensions and Tells Two Stories

Reporting for the Committee on National Defense, Colonel Beckwith first referred to the impression that "the work of the bar is largely confined to men registered for Selective Service and their dependents. That is not true, and it is altogether probable, although we have no trustworthy statistics, that apart from the processes of registration themselves, a greater volume of work has been done for other members of the armed forces and their families than for the men registered under the Selective Service Act."

The "second misapprehension" adverted to by Colonel Beckwith was that "the work of the bar is somehow limited to the moratorium privileges of the Civil Relief Act. The truth is that the cases so far handled, numbering into the thousands, probably occurring at least once in every county in the country, range over the whole field of law, so far as an individual citizen is ever affected by it."

Chairman Beckwith then told two stories which he said were "actually typical of what goes on" in the committee's work.

"The first," said he, "relates to a man who came out of the hills of Tennessee who was drafted and was sent to an encampment in Florida. He got leave and went home to the hills. He borrowed a battered car from a buddy and took his best girl for a ride. He had just enough time to get home and then make his train and so get back to camp before his leave was up. He wrecked the car. He still had to run for his train, so he left the wrecked car on the roadside and notified a garage to come and get it. He got back to camp in time to avoid being marked A.W.O.L.

"Meanwhile, a state trooper found the car abandoned by the roadside, and had it hauled into another garage, where they knew nothing about any former report. When the man who had been notified at the first garage got there and found there was no car as he expected, he reported it as a theft, so the first trouble the soldier faced was danger of court martial for having lied to his commanding officer when he said the car had not been stolen. Then there was an installment sales contract still outstanding, and the installment seller made a claim against the insurance company for a collision. The company, however, had two reports from two different groups, and so they deducted fifty dollars twice.

"The poor soldier took up the matter with the Judge Advocate of his station, and some three-quarters of an inch of papers were accumulated, his case not being particularly aided by the fact that the buddy who loaned him the car wrote an illegible hand and he got the name of the town mixed up, which formed the possible basis of another charge against the soldier. Just at that moment, the soldier was transferred, and immediately put upon a conveyance to one of the remotest posts in Alaska.

"That case came to the Washington office of your committee; it went to the Chairman of the State Bar Committee of Florida; it has been disposed of. The soldier will not be disciplined. The several financial interests have been satisfied, and the report made to the Judge Advocate General of the Army has resulted in a very happy letter."

What Happened in a State Which Had No Defense Committee

"In a state which shall be nameless here, we were told that they did not have, and that there was no reasonable prospect that they ever would have, a defense committee of the state bar. There was a woman in that state who had a pad—at least she had one sheet of what we used to call pencil tablet paper, which you could get for a nickel. On that sheet, in what looked to be perhaps an elderly hand, she wrote substantially this: 'Mr. President, The White House: My son is a volunteer in the Army. He is a good boy. He bought me some furniture. There is twenty-seven dollars due on it. I can't pay that much at once, and the man says he is going to take it away. What can I do?'

"That came down, through our established channels, from the White House to the Adjutant General of the Army, and then to our office; and it went with a summary of what we were trying to do, re-stated for perhaps the third time, to the president of the state bar. That state today has one of the largest and one of the most distinguished committees among all the states. That simple letter on a page of a five-cent pad accomplished the result which no amount of most eloquent persuasion in the name of the organized bar could possibly do.

"As for what we call personal services to the men in the armed forces and their families, many of you have yourselves worked in what we call our great machine, and perhaps it would do to leave it at that. We have already had appeals. I mentioned one from Alaska; there have been more. They come from Hawaii, and from the Canal Zone, and from every place intervening. We know that it will not be long before we shall have requests from Newfoundland, and Iceland, from Trinidad and the Tropics. We know, too, that the work that has been done has been so good, so totally free from complaint even for delay, that no matter where it comes from or what there is about it, it will be attended to. And we can take that satisfaction to heart."

Letter from J. Edgar Hoover of FBI

Chairman Beckwith reported that

he had just received from J. Edgar Hoover of the FBI, a letter which said,

"I feel that the cooperation of your state chairmen is doing much to prevent hysteria and vigilante action in the intelligence field which are a hindrance to the efficient functioning of constituted law enforcement agencies, while in addition it constitutes a menace to the rights and reputations of individuals who may be erroneously suspected of inimical activities. I believe that a full and free discussion by the heads of our field offices with the chairmen of your state committees on National Defense relative to the ways in which you can render cooperation with reference to intelligence matters will be mutually beneficial.

"I will appreciate your advising the state chairmen that they will be contacted in the near future by representatives of this Bureau for the above purpose."

In closing, Chairman Beckwith voiced the willingness of the bar to "cast into this emergency everything we have and, if necessary, all we hope to be." He added that,

"There is present in this room the collective voice of the legal profession. There is here in one place the organized power and public spirit, the unselfish and loyal soul of the bar. Let us stand up and go forward in the defense of the nation. Let us be sure that we do not fail and that the faith of the people shall not perish."

Committee Report on Improving the Administration of Justice

Judge John J. Parker, of North Carolina, was greeted warmly, when he arose to present the report of the Committee on Improving the Administration of Justice. "If this bar association exists for any purpose at all," he declared, "it certainly exists for improving the administration of justice. Our committee has seriously accepted the responsibility placed on us by the Association. We have been making real progress."

Judge Parker's report was in summary of the matters detailed in an address which is published elsewhere in this issue. He moved that "the work of the Special Committee and the program for the improvement of judicial administration adopted by the Association in 1938 be accorded the continued support of the Association." This was seconded by Walter P. Armstrong, put to a vote, and carried amid applause.

Other Committees Make Their Reports

Chancellor Joseph P. Gaffney, of Pennsylvania, gave an interesting summary of the report and work of the Committee on American Citizenship, of which he was chairman. He especially stressed the importance of the general circulation of a booklet to serve as a guide-book in combating ideas repugnant to the American form of republican government. As the report contained no recommendations for action, it was received.

For the Ways and Means Committee, Chairman Howard L. Barkdull, of Ohio, reported that up to the moment, 844 sustaining memberships had been received during the year, representing about $21,100 in funds. These have come in from every state in the Union, with thirty states having produced six or more. The largest number are in Illinois; Missouri produced 105 sustaining memberships.

Chairman Barkdull referred also to the proposed incorporation of an American Bar Association Endowment, to which gifts or bequests might be made by persons wishing to provide for the permanent financing of the Association or some particular projects of the Association. At the present time, such gifts or bequests, such as that for the Ross Essay prize, have been received and held, as well as administered, directly by the Association. It has been felt that additional and larger sums might be received, through the agency of an incorporated endowment under Association control. The Board of Governors approved the proposed articles and by-laws, except Article IV, Section 1, with the elimination of which the committee was in agreement.

All directors of the Endowment must be members of the Association; all members of the Association will be members of the Endowment, which will have a place on the program of each annual meeting; gifts to the Endowment may be in furtherance of Association purposes, but solely through processes of education and research; and the following restriction will be explicitly placed:

"None of the funds, property or income of the corporation shall be used in attempting to influence legislation by the carrying of propaganda or otherwise for the benefit of any individual member of the corporation."

Chairman Barkdull moved that the report of the Ways and Means Committee, as to the Endowment, be approved; that the Ways and Means Committee be instructed to proceed with the incorporation of the American Bar Association Endowment, as a corporation not for profit, under the laws of the State of Illinois or under the laws of some other state if for any reason Illinois is not available; and that necessary steps be taken to publicize the fact that an instrumentality is available for the receipt of gifts and bequests. The motion was put to a vote and carried. Upon a question raised by John Kirkland Clark of New York, the committee was given time to make and submit its recommendations of five members to be named as incorporators and first directors of the Endowment.

Report by Committee on Jurisprudence and Law Reform

At the suggestion of Chairman Walter P. Armstrong, the report of the Committee on Jurisprudence and Law Reform was then given by its secretary, Howard Cockrill, of Arkansas. He said that "the gist of the report is that the committee has felt during the past year that it has had enough material to work on, and should therefore attempt to convert into law those measures which have already been approved. Therefore, the work of the committee has been

directed in that direction."

Mr. Cockrill moved the adoption of the committee's sole present recommendation for further action by the House, as follows:

"Resolved that the Conference of Senior Circuit Judges be requested to place on its agenda for discussion the following question: Is legislation desirable authorizing the Chief Justice of the United States to assign circuit judges to temporary duty in a circuit other than their own?"

This suggestion was stated to be proffered for the purpose of helping to relieve congestion in some circuits. The motion was adopted without a division.

Chairman Gay appointed as the committee to prepare a memorial with respect to the late Judge Lumpkin, State Delegate from South Carolina, Messrs. John M. Slaton of Georgia and George L. Buist and B. A. Moore, of South Carolina; as the committee with respect to the late Judge Jesse Miller, Messrs. Thomas J. Guthrie of Iowa, Burt J. Thompson of Iowa, and W. E. Stanley of Kansas.

SECOND SESSION

The second session found the House down to business in earnest, with a formidable calendar of reports by Committees and Sections. Legislation as to aviation salvage at sea was endorsed, after conflicting points of view were ironed out. Public relations work by the bar and the public information program of the Junior Bar Conference were presented. The constructive accomplishments of the Committee on Unauthorized Practice of the Law were reported, as well as the new technique of the Committee on Professional Ethics and Grievances. Progress toward more adequate judicial salaries and better methods of judicial selection was chronicled. The reports showed many substantial accomplishments by the Association during the year, along lines sponsored and supported by the representative House.

AT the second session of the House, held Wednesday afternoon, October 1, the report of the Special Committee on Bill of Rights (Ex-Judge George I. Haight, of Illinois, Chairman) was received. The Board of Governors reported against making this a standing committee; and the report of the committee was, on motion, approved in other respects.

Chairman O. R. McGuire, for the Committee on Administrative Law, gave a graphic account of the committee's work in behalf of Association objectives during the year. He spoke plainly as to the obstacles which had been encountered as to enacting into law even the recommendations of the "minority" in the Attorney General's Committee on Administrative Procedure. He urged that all state and local bar associations should put forth their best efforts to enlist also the support of business and civic organizations in order to accomplish remedial legislation without further delay. "It seems to me that we can never compromise upon executive justice without any independent judicial review," he said. Chairman McGuire urged all members of the Association to read and study the addresses of Attorney General Biddle and Dean Pound. These were published in full in the November issue of the JOURNAL. Chairman McGuire received a hearty demonstration by way of applause, in recognition of the long and valiant fight he had made in behalf of the Association's proposals for administrative reform, notably as embodied in the Walter-Logan bill.

Report as to Labor Legislation

In reporting for the Committee on Labor, Employment and Social Security, Ex-Judge William L. Ransom, of New York, referred to the recommendations made by the Committee in 1939, 1940, and at the midwinter meeting of 1941, those of last March being in relation to mediation or conciliation of labor disputes, especially in defense industries.

"Those recommendations, so far as your committee is concerned," declared Chairman Ransom, "are neither withdrawn nor modified. It is not the view of your committee that recommendations once made and acted upon by the House need to be submitted perennially for reiteration."

As to the decision of the present committee to offer no further recommendations for action at this time, Chairman Ransom said, in part,

"Your committee has been uncertain as to the course it should pursue with respect to many of the matters under public discussion as to labor relations during these past very trying months. In the first place, many of those matters are closely related to the whole question of the procedure of administrative agencies; and it was felt that a committee dealing only with the labor field better not take the initiative pending a determination as to the more general legislative policy.

"Beyond that, there was a feeling that these months have been times when the ordinary considerations which would lead to the consideration of amendments of the National Labor Relations Act and correlated statutes, the ground which ordinarily would appeal to lawyers and the public, were not being considered at all, and would not receive active consideration in the halls of Congress; and that the avoidance of labor controversies during the national emergency is in the hands of those who are charged with the highest responsibility and has to be dealt with, in a very delicate fashion, from that national point of view.

Further Recommendations are Deferred

"With a good deal of reluctance, a majority of your committee has felt that no useful purpose would have been served at this time in the

bringing forward of further recommendations, in the name of the organized bar, for amendments or regulations or legislation in that field. Two members of the committee, on the final submission of its report, appended separate statements in which they expressed the view that regardless of those considerations relating to the emergency, your committee should proceed, or should have proceeded, with recommendations.

"I am frank to say to you that with most of what is said in the two separate statements, at least four members of your committee are in personal accord; nevertheless, whether we were right or whether we were wrong, a majority of your committee felt that, for reasons which are stated in our report, no useful purpose would be served by the intervention of the Association at this time. However, it is certainly the opinion of a majority of your present committee that, during the coming year, whoever are the members of your Labor, Employment and Social Security Committee should proceed to the development and submission of further recommendations for your consideration."

Report as to the Economic Condition of the Bar

Chairman John Kirkland Clark, of New York, said that in view of the concentration of Association efforts on defense activities, the Committee on the Economic Condition of the Bar had largely "marked time" during the past year. He referred to the fact that there have been completed, during the past year, surveys of the economic condition of the bar in two states. In New Jersey, under a WPA project, a report was rendered to the State Bar, and one was made by the Detroit Bar Association as to the status of the Michigan bar.

"Obviously, at a time like this, when practically every lawyer, as well as every business man, is so submerged by questionnaires," said Mr. Clark, "it is no time for us presently to undertake a survey of the condition of the bar throughout the country, as we had hoped to do. We have been working on the paring down and clarifying of a questionnaire which may be ready for immediate use if, as and when the present disturbed condition known as the national emergency shall cease."

Debate and Division as to Securities Laws and Regulations

Discussion and a division of the House arose as to the report and one of the recommendations of the Committee on Securities Laws and Regulations, presented by its chairman, Talcott M. Banks, Jr., of Boston. The committee rendered a comprehensive report as to what has taken place by way of proposals to amend the federal statutes, covering both the bill of Representative Wadsworth and the so-called SEC-industry proposals arising out of a series of conferences. The committee asked action on two resolutions.

After Chairman Banks had reviewed extensively the principal points at issue in the Wadsworth Bill and in the SEC-industry proposals, and had indicated the attitude of the committee on these points, he moved the adoption of its two recommendations in the following form:

"Resolved, that the American Bar Association opposes any substantial extension at this time of federal laws regulating securities and securities exchanges;

"Resolved, that the American Bar Association favors amendment of the federal laws regulating securities and securities exchanges to relieve private business of the burdens incident to such regulation, so far as this may be done without fundamental impairment of the effectiveness of the laws now in force."

Former President Charles A. Beardsley, of California, took the floor to declare what seemed to him "a matter of Association policy in connection with these resolutions. In the first resolution, we are asked to oppose any extension at this time of the regulation of securities. We are not asked to oppose any of the four specific proposals, discussed by the Committee. I do not believe that this Association should get into any such negative attitude. If you want to oppose specific things, say so, and do so, but do not oppose everything."

Mr. Beardsley urged that "The second resolution is just as broad and indefinite. We are told that we should favor legislation that may be beneficial and that may be adopted without any fundamental impairment of the effectiveness of the law. I do not know what that means. I do not know what legislation is proposed. We are not told that we are to favor specific legislation, but simply on a broad basis that we are against any extensions, but we are for anything that may help the securities."

Chairman Banks defended his committee's recommendations as sufficiently definite for declarations of policy. Mr. Burton W. Musser, of Utah, asked that the two resolutions be voted on separately. This was done. The first resolution was declared adopted by a rising vote, without a count. The second resolution received a vote of 51 for and 52 against, and accordingly failed of adoption.

Reports on Customs Law and Legal Aid

Albert MacC. Barnes, of New York, Chairman of the Committee on Customs Law, gave its report and discussed also the bill known as H.R. 3816, which he said was of no particular importance unless an interpretation were given to the bill, along lines which his committee believed would be erroneous, for reasons which he stated. Chairman Barnes referred also to the participation of several members of his committee in the deliberations of the Inter-American Bar Association or conference at Havana.

"We were helpful if not instrumental," he said, "in obtaining a resolution at that Inter-American Bar Conference that a committee be created for the study and preparation of such plans as it believes necessary for making uniform the customs laws of this hemisphere. Never before, so far as I know, has any such effort been made, and this committee hopes

to participate actively in bringing what we believe is a laudable undertaking into being."

Chairman Harrison Tweed of the Committee on Legal Aid, was next recognized to submit the report of the Committee. "We are trying to do things which will help the bar in the administration of justice," he declared. "We have a platform that calls for, first, encouragement of teaching in the law schools something on the subject of the obligation of the bar to the poor and the way in which that obligation can be discharged. Second, we are working on the drafting of a statute which will not only permit the poor to have their day in court without paying regular court costs as such, but will also exempt them in a proper case from the payment of incidental expenses of litigation, such as witness fees, advertising expenses, and things of that sort. The third thing we are seeking specifically to do is to get organized legal aid established in something like twenty-four cities of over a hundred thousand population, where nothing of that sort exists, simply because no one has taken the trouble, the energy to get it done. The fourth thing that we have in mind has to do with representation of the poor in the criminal courts. We plan to make a study of what is done in the way of representation of the poor in the criminal courts in various cities and communities, primarily those having a population of over two hundred and fifty thousand."

A motion made by Chairman Tweed for approval of his committee's report was adopted by the House.

Interesting Discussion as to Report on Admiralty and Maritime Law

An interesting three-angled situation developed when State Delegate Cody Fowler, of Florida, gave the report of the Committee on Admiralty and Maritime Law, of which he was chairman. First he reported what the committee had done, under authority granted by the House last March, by way of cooperating with the Maritime Law Association of the United States, with a view to enlarging the powers of the Supreme Court as to admiralty practice and procedure. To empower the committee to go ahead with the project, in cooperation with the Maritime Law Association or authorize the committee to act alone, to the end that the Supreme Court may be given the same powers as to admiralty practice and procedure which it has and exercises as to civil and criminal causes, Chairman Fowler submitted the following recommendation to authorize the committee:

> To continue to collaborate with the Maritime Law Association of the United States in having introduced and enacted into law an act extending the powers of the Supreme Court of the United States in prescribing rules of practice in Admiralty in accordance with the recommended statute contained in this report, and if the Maritime Law Association fails to act, that this committee be authorized to proceed alone.

The Secretary advised that the Board of Governors had approved this recommendation, which was then adopted by the House.

Chairman Fowler referred next to the so-called "amphibian tort" bill, which the Association approved in 1938 as S.680, and authorized the committee to seek its enactment into law. It is now known as the Baldwin-Andrews Bill (H.R.4759). The Board of Governors approved the committee's recommendation that it be authorized to continue its efforts to have the bill enacted into law. The House adopted the recommendation.

Joint Report as to Aviation Salvage

The third matter dealt with the committee's report on aviation salvage at sea. The reports of the Committee on Aeronautical Law and the Committee on Admiralty and Maritime Law having been at variance on this subject last March, the House referred it for study and report to the two committees and to the Section of International and Comparative Law. Chairman Fowler asked that Arnold W. Knauth, of New York, be permitted to make the joint report. Leave was granted.

"This particular problem," said Mr. Knauth, "is whether, when airplanes fall into the sea and people rescue airplanes and property and persons from airplanes, the people shall be rewarded as though they had rescued shipments and cargoes of ships and people from ships. A court in Scotland decided a few years ago that a seaplane is not a vessel; consequently, a Scotch fishing boat which gave up its fishing season and its profits in order to rescue a stranded airplane expedition and their valuable goods, were told by the court that they could not get a red cent. If the airplane gentleman desired to give him a bonus, he might; but so far as the court was concerned, they had no rights to any reward.

"Parliament immediately enacted a bill in England to reverse that decision and to direct the judges in England to treat airplanes and airplane property and passengers who fall into the water by chance, exactly the way they treat ships and ship cargoes and ship vessels. Now the proposition is to enact that same law here, as has been done in the Irish Free State."

Differences of Opinion Were Ironed Out

Mr. Knauth explained that, in Chicago last March, the Admiralty Committee recommended that "the United States should not merely enact a simple law like the English one; we should go a step further and we should enact the text of an international convention on air salvage, signed at Brussels in 1938. That convention goes on and imposes various duties on the commanders of aircraft. The Aeronautical Committee said, 'Oh, no, aviation is not yet fit for that situation; in fact, the whole subject should be left alone.' "

So the House called in a third party, the Section of International Law, as "moderator." Its committee listened to both sides, and said, that "both were too extreme." Mr. Knauth stated that,

"The result is that we come to you now with this three-headed report, the Admiralty Committee, the Aeronautics Committee, and the Section of International and Comparative Law; and we come to you united on the recommendation of Mr. Turlington and his committee that we should

have a simple law, simply declaring, as was done in England and Ireland, that airplane property and passengers in peril at sea should be treated exactly like ship property. That is the joint recommendation. It is perfectly fair to say that the Aeronautic Committee still thinks for itself that nothing should be done. It is also fair to say that the Admiralty Committee still thinks that the more elaborate regulation is eventually going to come about."

Specific Recommendations as to Substance of a Bill

Specifically, the recommendation was that the Association favor the immediate enactment of a bill to the effect that:

"any services rendered in assisting, or in saving life from, or in saving any aircraft or the cargo or apparel of an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, whether within or beyond the limits of the territorial waters of the United States, its districts, territories, or possessions, or on the Great Lakes, or on any inland waters within the admiralty and maritime jurisdiction of the United States, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel . . ."

Committee on Aeronautical Law Still Does Not Join in the Recommendation

Chairman Fowler then stated to the House that Mrs. Mabel Walker Willebrandt, Chairman of the Committee on Aeronautical Law, "calls my attention to the fact that the views of her committee still are that they consider enactment of any law at this time premature because the matter is still being studied. That, of course, is contrary to the recommendation of the Section of International and Comparative Law and the Committee on Admiralty and Maritime Law."

Mrs. Willebrandt took the floor to confirm and emphasize Chairman Fowler's statement. Chairman Chauncey Wheeler, of the Committee on Rules and Calendar, made the point that the joint recommendation was not in a form complying with Article X, Section 20 of the House Rules, in that no draft of a specific bill is presented. Chairman Fowler explained that the Committee was asking approval of the substance and principle of legislation; he read also the following draft (excepting the enacting clause) of the specific bill to carry the declaration into effect:

The Text of a Bill Is Submitted

"The navigation and shipping laws of the United States, including any definition of 'vessel' (or 'vehicle')* found therein, and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft, *except in the following instances:*

"i. Any services rendered in assisting, or in saving life from, or in saving any aircraft or the cargo or apparel of an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, whether within or beyond the limits of the territorial waters of the United States, its districts, territories or possessions, or on the Great Lakes, or on any inland waters within the admiralty and maritime jurisdiction of the United States, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel, her apparel, cargo, freights, and the persons on board, notwithstanding that the aircraft concerned may be a foreign aircraft, and notwithstanding that the services in question are rendered elsewhere than within the limits of the territorial waters of the United States.

"ii. Where salvage services are rendered by persons in an aircraft to any property or person within the admiralty and maritime jurisdiction of the United States in respect of maritime salvage, the salvors and the owner of the aircraft shall be entitled to the same remedies and reward for those services as they or he would have been entitled to if the aircraft had been a vessel, notwithstanding that the aircraft may be a foreign aircraft and notwithstanding that the services in question are rendered elsewhere than within the limits of the territorial waters of the United States."

"Section 2. This Act shall take effect immediately."

With the specific bill thus before the House for its consideration, Mr. Wheeler withdrew his point of order.

Chairman Fowler's motion to approve the draft of the bill and authorize the Committee to seek its enactment was then adopted by the House.

Committee on Aeronautical Law Provokes Discussion

Mrs. Willebrandt then presented the report of the Committee on Aeronautical Law. She gave in detail the reasons for its first recommendation, that the Association withhold endorsement or recommendation of the Uniform State Regulatory Act, which it had approved in 1935. She urged this because:

(1) There has been a complete change in federal law; (2) there has been an accumulated wealth of experience under an attempt to secure uniformity in the aviation field by means of uniform state acts and action of regulatory bodies created under those acts; (3) there has been very drastic change in pronouncements of the Supreme Court pertinent to this question."

Conrad E. Snow, of New Hampshire, asked if the 1935 endorsement of the Act should be withdrawn. Secretary Knight stated that,

"The recommendation of the Board of Governors is in effect an endorsement of the recommendation of the committee, but in language different, and this is the language which the Board of Governors has suggested: 'That the American Bar Association for the time being suspend further recommendations of enactment into law of the uniform state regulatory act for aviation approved by this Association in 1935.' It is not to withdraw; it is to suspend for the time being."

W. E. Stanley, of Kansas, moved that the language recommended by the Board of Governors be sub-

*None of the navigation or sh pping laws refer to "vehicles."

stituted for the committee's wording and adopted. Ernest S. Williams, of California, asked, "Is any similar legislation on this subject-matter at present under consideration?" Chairman Willebrandt explained the present legislative situation. Mr. Stanley, of Kansas, said that the course recommended by the Board of Governors "is the most effective action which we could take at this time." B. Allston Moore, of South Carolina, informed the House that the 1935 Regulatory Act is not being pressed for enactment in any state, but is being withheld until the situation as to federal legislation clears. He thought that the recommendation of the committee "was really not necessary" and that the action recommended by the Board of Governors should be taken.

Mr. Stanley's motion to adopt the recommendation of the Board of Governors was put to a vote and adopted by the House.

Permanent American Aeronautical Commission Is Approved

Chairman Willebrandt reported that her committee and the Section of International and Comparative Law join in the following recommendations:

> That the American Bar Association urge that the United States immediately organize a National Aviation Commission to function when the permanent American Aeronautical Commission (CAPA) is organized for the purpose set forth in the resolution adopted by the Inter-American Technical Aviation Conference held at Lima, September 15-25, 1937.
>
> That the American Bar Association recommend that the government of the United States through such media as may be proper, encourage the organization by the respective American Republics of National Aviation Commissions within their countries, pursuant to the above-mentioned resolution at Lima, to the end that a permanent American Aeronautical Commission (CAPA) may be established as soon as possible.

The Board of Governors reported in favor of these recommendations, which were adopted by the House.

Chairman Willebrandt announced that the committee favored for next year a thorough study of the subject of liability, in the aviation field. She then moved the adoption of the report of the committee, with the substitution made as to the first resolution. This was voted by the House.

Chairman Kenneth Teasdale, of Missouri, gave a comprehensive and factual report for the Committee on Legal Service Bureaus. In concluding, he said that the committee has suggested that its name is a misnomer, and might well be changed.

Secretary Knight reported that the Board of Governors recommended that the committee be known as the "Committee on Low Cost Legal Service Bureaus." This was accepted by Chairman Teasdale, who moved the adoption of the report, with the change of name. This was carried by the House.

Reports as to Judicial Salaries and Judicial Tenure

Chairman Walter S. Foster, of Michigan, in reporting for the Committee on Judicial Salaries, felicitated the House on the efficacy of a resolution which it adopted a year ago, "requesting committees from state bar associations to make surveys in their respective states as to what the case load was for the various judges, the population served, and the adequacy of their salaries. That was very helpful. The salaries were raised in four states. The judicial retirement plans were either adopted or improved in three states. New surveys are under way in five states, and plans are under way to organize for a survey in seven states. In nine states, attempts were made either to raise salaries or to improve the retirement provisions, without success. In the opinion of this committee, it was because they proceeded too expeditiously. Their efforts were in good faith but if they had actually carried out your instructions to collect the real data and be well fortified with facts, they would have progressed further. Those states, however, are at work for a renewal."

This report having been received by the House, the next in order was that of the Committee on Judicial Selection and Tenure. In behalf of the Chairman, ex-Judge John Perry Wood, of California, it was stated by Kurt F. Pantzer, of Indiana, that Judge Wood keenly regretted his inability to be present.

"It is the first session of the House since its organization which he has missed," said Mr. Pantzer, "as well as the first annual meeting. Judge Wood felt it of paramount importance to attend a meeting of the Colorado Bar Association at which the proposal of constitutional changes affecting the appointment and tenure of judges was to be presented."

The printed report of the committee was ordered received and filed.

The Committee on Cooperation between the Press, Radio and Bar (Giles J. Patterson, of Florida, Chairman), recommended that the committee be discharged. In the absence of the chairman, the report was received and its sole recommendation adopted.

Report of the Committee on Public Relations

Raymer F. Maguire, of Florida, reported that the Committee on Public Relations recommended:

"That the Board of Governors in its discretion be authorized to (1) institute a program with respect to public relations, looking toward complete cooperation between the American Bar Association and the state associations.

"(2) Employ a full-time representative to work, under the direction of the President and the committee, in continuing and extending present publicity, and in carrying out a program of public relations.

"(3) Appropriate, with the approval of the Budget Committee, $8,000.00 per annum to be expended in carrying on the work of the Committee on Public Relations, and in the employment of a Director of Publicity."

In presenting the reasons for these recommendations conditioned on the availability of the funds and the discretion of the Board of Governors, Chairman Maguire declared that

"the state and local bar associations believe it to be the obligation of the American Bar Association to correct misrepresentations and to expose unfair criticisms which are taking place on a national basis." As instancing the type of work which could be done in that regard, he narrated the following:

"Some months ago, a nationally known concern, putting on its advertising program, brought into the picture, I believe, Kay Francis' stepmother. Shortly they portrayed in their radio program the denial to the stepdaughter of justice through the chicanery of the stepmother, guided and led on by an artful and deceiving lawyer. The matter was referred to the Committee on Public Relations by the President of the American Bar Association, and we immediately took it up with the national concern by wire and otherwise. Within a short period of time, we had assurances not only that that kind of program would not again occur by that national concern in its advertising, but, in addition that they would make amends; and they did, in showing up, so to speak, the rascal by the bar association.

"A further illustration: Recently, a magazine which has a nationwide and hemispheric-wide circulation carried an article on how lawyers win cases. According to the point of view of many, the article was almost slanderous of the legal profession. Through our committee, we took that up with the editors. We received the finest kind of letter, advising that there was no way they could answer the argument which we had advanced, to the effect that the magazine was just as interested in maintaining the respect for the courts and for the lawyers of America as could be any person or group in the country, including lawyers.

"They say simply this: 'We regret the incident: we did not think that the public would take the reaction which it is asserted that it did take.' Further, that there would be no recurrence, and they say, 'We hope we may have an article portraying the fine side of the American lawyer that will take the bad taste out of the mouth of the people'."

Protecting the Profession of Law Against Misrepresentation

"The most recent illustration was this: There is a comic strip called 'Ella Cinders.' The morning of August 27, there appeared in this strip the portrayal of a lawyer selling out his client. He was defending her on some criminal charge. Someone comes in and says to him, 'How much would it be worth to you just to incidentally let your client be convicted?'

" 'Well,' he said, 'how much is it worth to you?'

"The person seeking to influence him said, 'Twenty-five dollars.'

" 'Well,' he said, 'I think that's all right.'

"There we had portrayed the sale of the lawyer's services on two sides, and the betrayal of his client. Those things make a profound impression on people older than twelve years of age, and they think that in fact and in truth such things many times happen. We know it is not so, but we know that when no one raises a voice in objection, it is presumed to be so.

"We did raise our voice in objection. We pointed out to the managers of that comic strip that that type of thing destroyed America, and that one who had engaged in that type of practice was an enemy of good government. They came back and admitted that that is a fact, and they have said that there would be no recurrence of that in the comic strip, 'Ella Cinders.'

"We talk in terms of national defense. We are thinking just now in terms of aggression from without, but it seems to me that the great problem that is going to have to be served in this country is defending America from aggression within. We need to be on our toes in promoting a system and an administration of justice that will preserve the rights of the individual, and to do that we must build up the lawyer and the bar association and the administration of justice, not for the benefit of the lawyer but for the preservation of American liberty."

Ex-Judge Lawther asked if the Board of Governors had passed upon the committee's recommendations. Chairman Gay replied, "The Board of Governors has not passed on this. It has not been before them." Judge Lawther moved that the report be referred to the Board of Governors. This was seconded.

Chairman Maguire opposed the motion. James L. Shepherd, Jr., of Texas, supported the substitute motion to refer. On being put to a vote, this motion was carried.

Report by the Committee on Professional Ethics and Grievances

Judge Orie L. Phillips, of Colorado, and the United States Circuit Court of Appeals, in reporting for the Committee on Professional Ethics and Grievances, said that,

"The character and extent of the inquiries that have come to your committee during the past year indicate two things: First, an increasing interest on the part of the local and state bar associations in the subject of ethics; second, that, generally speaking, we find a sincere desire on the part of the profession generally to acquaint themselves with the accepted standards and to adhere to them.

"Your committee, of course, has certain disciplinary powers. We may entertain and hear complaints; we may recommend to the Board of Governors disciplinary action as to members of the Association. During the past year we adopted a somewhat different policy with respect to these matters. We have endeavored to bring about compliance by voluntary action rather than to enforce it by discipline. I give you an instance or example. We had a complaint against two members in a specialized branch of the profession, charging them with advertising or soliciting business contrary to Canon 27. We found on investigation that these two members were just doing what all of the members of the Association —and there were quite a number involved—were doing in their partic-

ular metropolitan area; that is, they were all advertising. They were advertising in the newspapers and in other forms of publication.

"After hearing the matter, we suggested that what we ought to do is get rid of the whole situation. These two members went home, organized a section, in their own association, of their particular specialized branch, adopted Canon 27 as a governing rule of that Section and secured a voluntary agreement upon the part of all the members in the specialized branch to do away with all forms of advertising. A great many advertising contracts were cancelled; and advertising on the part of that group in the profession, many of whom, as I stated, were members of the association, went out the window.

"We think that is a more constructive way than to call in a couple of members and hit them over the wrist with a ruler. That is only one example of a number of instances of that kind."

Constructive Accomplishments Reported by the Committee on Unauthorized Practice of the Law

Chairman Edwin M. Otterbourg, of New York, of the Committee on Unauthorized Practice of the Law, reported that this "has been a very fruitful year of work," in carrying out the program of cooperation with national lay organizations and business men to end abuses in various fields. He referred to the agreement made with all of the principal publishers of loose-leaf services, the arrangements made with the National Association of Broadcasters, the agreement and notable declaration of principles recently worked out with the Trust Division of the American Bankers Association, and other constructive and amicable achievements in eliminating the invasions of lawyers' work by lay institutions. Details of these accomplishments have been published in the JOURNAL from time to time during the year. Chairman Otterbourg filed a supplemental report containing the statement of principles just approved by the American Bankers' Association.

The next order on the calendar was the Report of the Special Committee on Law Lists. At the suggestion of Chauncey E. Wheeler, of Rhode Island, action upon the committee's report was deferred on the calendar until the supplemental report of this committee had been considered and reported on by the Board of Governors.

Report by National Conference of Commissioners on Uniform State Laws

After a week of activity at sessions of the National Conference of Commissioners on Uniform State Laws, held in Indianapolis, its President, William A. Schnader, of Pennsylvania, had been obliged to return home. The report of the Conference, as prepared by Mr. Schnader, was presented by W. E. Stanley, of Kansas.

The report stated that the 1941 sessions of the Conference "adopted only one act, the Uniform Vital Statistics Act. The need for this Act was disclosed when the last census was taken, and has become more pronounced since the Selective Service Act was passed. It has been submitted to the Board of Governors for its approval.

"A number of sessions of the Conference were devoted to consideration of the first tentative draft of a revised Uniform Sales Act. The Uniform Sales Act was adopted by the Conference and approved by the Bar Association in 1906, thirty-five years ago. Changed economic conditions and the great development of business and industry have made it essential that this act be revised. In addition, the Conference has taken cognizance of the movement for the passage of a Federal Sales Act. Those advocating the passage of such an act are cooperating with the Conference, and the Conference is cooperating with them in an effort to work out an act which will be applicable both to inter- and intra-state transactions. Much progress has been made this year."

Mr. Stanley added that "This year, at the sessions of the legislatures, there were eighty-four adoptions of uniform acts promulgated by the Conference of Commissioners on Uniform State Laws and approved by this Association. I think that is an indication that it is one of the livest subjects that we have, and that the Conference is fulfilling one of the provisions of the Constitution and By-Laws of the American Bar Association with respect to assisting in making the laws of the states uniform."

Report by the Section of Bar Organization Activities

Chairman Burt J. Thompson, of Iowa, for the Section of Bar Organization Activities, presented a compact report and a lively account of the work of the Section, with its nine regional conferences which "took the Association into every judicial circuit of the United States." Emphasis was placed on national defense and the improvement of judicial administration.

Chairman Thompson presented, and recommended that the House adopt, the following resolution passed by the Section:

> Resolved, that the name "Bar Organization Activities Section" is cumbersome, and that it would be advantageous to change the name of the organization to "Section of Bar Activities."

Chauncey E. Wheeler, of Rhode Island, raised the point of order that to change the name of the Section would require a change in the by-laws, of which no notice had been given. The motion for a change of name was not pressed.

In behalf of the Section, Chairman Thompson moved the following:

> Resolved, that the Section of Bar Organization Activities recommends to the House of Delegates that the rules under which annual awards of merit are made to state and local bar associations be amended to provide that the chairman of the Committee on Award of Merit be appointed by the chairman of the Section of Bar Organization Activities instead of being selected by the committee after its appointment.

This was put to a vote and carried. The report of the Section was ordered filed.

Junior Bar Conference Proposes a Public Information Program

Chairman Lewis F. Powell, Jr., of Virginia, gave the graphic report of

the Junior Bar Conference, and moved the adoption of the following resolutions:

RESOLVED, By the House of Delegates of the American Bar Association, that the Junior Bar Conference be and hereby is authorized and directed to conduct a Public Information Program having the following objectives:

(1) To cooperate in such manner as may be deemed advisable by the Executive Council of the Conference with any agency promoting the national defense.

(2) To aid in the development of national unity, morale and the spirit of sacrifice for the common good.

(3) To assist in the education of the public as to what our form of government is, and why it is superior to the totalitarian system.

(4) To promote the habit of informative unemotional community and group discussion of public problems as the best and most democratic method for the solution of such problems.

(5) To improve relations between bar and public by demonstrating that lawyers are interested in the public's problems and willing to contribute of their time and energy to the solution of such problems.

(6) To cooperate with committees and Sections of the American Bar Association to the extent approved by the Executive Council of the Conference and the Board of Governors of the American Bar Association.

Provided, however, that the speech topics to be included in the Public Information Program shall be determined after consultation with the Committee on Administration of the Board of Governors of the American Bar Association, and provided, further, that the Public Information Program hereby authorized may be modified or expanded with the approval of the Board of Governors of the American Bar Association or of its Administration Committee; and be it further

RESOLVED, That the Conference may seek such financial assistance from such sources as may first specifically be approved by the Board of Governors of the American Bar Association or by the Administration Committee of said Board.

In response to a question by the Chairman of the House, it was stated by Louis E. Wyman, of New Hampshire, chairman of the House Committee on the report of Sections, that "The House Committee has considered these recommendations and the proviso that before the Junior Bar Conference goes out and solicits funds, it shall first specifically secure the approval of the Board of Governors, was inserted on the suggestion of the Committee of the House because your committee felt that no committee or Section ought to solicit funds for the particular Section unless it was so specifically approved. The recommendations are approved by your committee."

The motion by Chairman Powell to adopt the resolutions was carried by the House.

Mr. Wheeler, of Rhode Island, moved "that the presentation of memorials in connection with the deaths of the late Judge Lumpkin and Judge Miller be made a special order of business for the House on Thursday afternoon at five o'clock." This was voted, and the House thereupon recessed until Thursday afternoon at two o'clock.

THIRD SESSION

The Thursday session of the House dealt with a grist of reports by Sections and Committees, and several interesting discussions developed. Changes in the policy and practice as to supervision of law lists and directories was voted, with the substitution of a "certificate of compliance" for Association "approval." The Committee on State Legislation obtained support for an ambitious program in behalf of uniform acts sponsored by the Association. The House concurred in the adoption of the four "open forum" resolutions passed by the Assembly. Association finances were vigorously discussed, in connection with a broadening of public relations work. Difficulties and differences arose as to the handling of various technical and specialized recommendations from the Section of Patent, Trade-Mark and Copyright Law. The Board of Elections submitted an electoral suggestion for consideration.

WHEN the formalities of the third session of the House had been completed on Thursday afternoon, the report of the Committee on Advancement and Coordination of National Defense was first received and filed, in the absence of its Chairman, Ex-Judge Thomas D. Thacher of New York.

As Chairman Stanley B. Houck of the Committee on Law Lists had been called home to Minneapolis, the report of the Committee on Law Lists was offered by W. Leslie Miller of Detroit. He referred to various proposed changes in the rules and practice governing the committee's supervision of law lists and directories, particularly the abandonment of "approval" of such publications. Instead, the committee asked for authority to "issue a certificate of compliance to the publisher of any Law List which the committee, upon such investigation, finds has complied with the rules and standards as to law lists of the Association and the regulations of the committee; and revoke, conditionally or otherwise, the certificate issued to the publisher of any such law list if the committee finds that the publisher thereof, after receiving such certificate, has violated any of such rules, standards or regulations."

To avoid any question whether the change from "approved" to "certificate of compliance" requires a change in the Canons of Ethics, the committee included the following provisos:

"A law list as to which such certificate shall be issued and unrevoked shall be deemed to be an 'approved' list within the intendment of Canons 27 and 43."

"The publisher of a law list which has received a certificate of compliance from the committee may rate its listees in a manner not disapproved of by the committee."

Howard L. Barkdull of Ohio,

James L. Shepherd of Texas, and John Kirkland Clark of New York, asked questions of Mr. Miller as to the recommendations and the proposed changes in the practice of the committee. Mr. Miller then moved the adoption of the committee's recommendations, in the following form:

Special Committee on Law Lists

The committee recommended that the Rules and Standards as to Law Lists be amended so as to read as follows:

That a Special Committee of five members be created, and respectively authorized, empowered and directed to

(a) procure information regarding Law Lists and from time to time advise members of the Association thereof;

(b) recommend to the Association for adoption from time to time such standards or rules, and amendments thereof, for Law Lists as may seem in the interest of the public;

(c) adopt, and from time to time amend, such reasonable rules and regulations for the conduct of its authorized activities as it may find desirable;

(d) endeavor to protect the public and members of the profession from dishonest, fraudulent or unworthy conduct of persons who represent, or claim to represent, Law Lists;

(e) cooperate with law enforcement officers and others interested in the censure or punishment of such dishonest, fraudulent or unworthy conduct;

(f) investigate, at the expense of the publisher of any Law List which shall request the committee to do so, whether such publisher is complying with the provisions of the Rules and Standards as to Law Lists;

(g) issue a certificate of compliance to the publisher of any Law List which the committee, upon such investigation, finds has complied with the Rules and Standards as to Law Lists of the Association and the regulations of the Committee; and revoke, conditionally or otherwise, the certificate issued to the publisher of any such Law List if the committee finds that the publisher thereof, after receiving such certificate has violated any of such rules, standards or regulations. A Law List as to which such certificate shall be issued and unrevoked shall be deemed to be an "approved Law List" within the intendment of Canons 27 and 43;

(h) take such action as it may deem advisable to cause the issuance or revocation of a certificate to be made known to the members of the Association.

Rules and Standards as to Law Lists

The Committee further recommended the following Rules and Standards, and each of them, be adopted as and for Law Lists in which lawyers may permit their names and professional cards to appear:

1. Every list of attorneys at law, legal directory or other instrumentality maintained or published primarily for the purpose of circulating or presenting the name or names of any attorney or attorneys at law as probably available for professional employment, shall be deemed a Law List.

2. The purchase or use of a Law List the publisher of which has a certificate of compliance may be recommended to attorneys at law, or laymen, by its issuer, only on the basis of the circulation, physical makeup and accuracy thereof, and the extent to which lawyers listed therein have been investigated. Efforts by the issuer of a Law List to otherwise secure employment for any attorney listed therein, or presented thereby, shall be deemed ground for not issuing a certificate of compliance, or for the withdrawal of the certificate if it has already been issued.

3. No certificate of compliance shall be issued to the publisher of any Law List or continue unrevoked

(a) if, in connection with the preparation, publication, distribution or presentation thereof, the issuer does, causes, permits to be done, encourages or participates in the doing of, any act or thing which, directly or indirectly, violates the Canons of Ethics of this Association, or which constitutes the unlawful practice of the law;

(b) which shall be conducted upon a basis which does not tend to promote the public interest, or which employs a practice not in accord with a high standard of business conduct;

(c) or if the price for representation, or listing therein, is not uniform within reasonably prescribed areas, or is exorbitant;

(d) or if any obligation is assumed by either user or attorney, to employ, exclusively or preferentially, in the forwarding, receiving or exchange of legal business, the attorneys listed therein;

(e) or if in the physical makeup thereof, preferential prominence shall be given to the name of any attorney or attorneys listed therein, by different size or character of type, underscoring or other methods employed by printers for emphasis or to attract attention; but the foregoing shall not prohibit the publication in the geographical section of a Law List of such professional card as the Canons permit or of a reference there to such card in another section of the book;

(f) or if the issuer thereof shall endeavor to direct or control, the professional activities of any attorney listed therein or presented thereby;

(g) or if such Law List shall be published or issued as a part of any professional, commercial, trade or business publication or journal;

(h) or if the issuer thereof shall neglect or refuse to promptly and fully (a) notify the Association in writing of any payment or payments made by such issuer, or by an indemnitor, upon claims of defalcation by a listed attorney, or to (b) cooperate, at the request of the Association, in the investigation, ascertainment and proof of the facts of such claims.

4. The publisher of a Law List which has received a certificate of compliance from the committee may rate its listees in a manner not disapproved of by the committee.

By vote of the House the report as to law lists was approved and the recommendations were adopted.

Report of the Section of Legal Education.

W. E. Stanley, of Kansas, Chairman of the Section of Legal Education and Admissions to the Bar, was then recognized to present its report. He first moved the following:

"Resolved, that the College of Law, Willamette University, Salem, Oregon, and the College of Law of the University of the City of Toledo, be approved as fully meeting the standards of the American Bar Association."

The motion was carried. Mr. Stanley moved also the following:

"Resolved, that the Detroit College of Law, Detroit, Michigan; the School of Law of Lincoln University, St. Louis, Missouri; the School of Law of the University of Newark, Newark, New Jersey; and the School of Law of Southeastern University of Washington, D. C., be provisionally approved as now meeting the standards of legal education of the American Bar Association."

Judge Lawther of Texas, Sidney Teiser of Oregon, and Chairman Stanley discussed the motion which was then adopted by the House.

Chairman Stanley then reported to the House that,

"Due to the fact that you have invested this Council with authority to approve law schools, your Council has become in fact a rating association in the educational field in the United States. We are so recognized, and being so recognized we have a responsibility to perform, so that if we are negligent in that responsibility, the burden of that neglect is apt

to fall squarely back into the lap of the American Bar Association.

"After inspection, although we have the responsibility to maintain standards in the United States in legal education, we have no way except voluntarily, which we have the authority to do, to go back and inspect the approved law schools of the United States, to see that they are performing a proper function in legal education.

"We have over a hundred approved law schools. We have not been around to inspect them. We haven't the funds to inspect them. In cooperation with the American Association of Law Schools, we are now trying to develop a questionnaire, but I am satisfied that today law schools in some instances, due to financial difficulty or otherwise, which were approved ten years ago, must and should be inspected if we are to maintain our responsibility as a rating association on education in the United States. Finances in some way must be provided to meet that contingency or else we must get out of the rating situation and the responsibility for it."

Chairman Stanley then referred to what the Section has done toward providing advanced legal education for the practicing lawyer. In concluding, he called attention to the fact that the present large decrease in law school attendance will affect income from tuition and that the serious decline in income will create difficulties within the schools. Already it is leading to proposals to lower the standards of pre-legal education, so as to bring in more law students. "The American Bar Association," said Mr. Stanley, "is not asking for any deferment of lawyers as a class; but if we are to preserve in the future the leadership of the bar of this country, we cannot deplete the law schools of the country for the next three or four years and leave that leadership devoid of the education that it is necessary to have. Some way must be devised to save these law schools. You gentlemen in your respective states must be ready to preserve the standards, to keep from undoing the work of this Association over the past twenty years."

Important Action as to State Adoption of Uniform Laws

In the absence of Judge Hanson, of Nebraska, Chairman of the Committee on State Legislation, its report was presented by Sidney Teiser of Oregon, who said that the Uniform Acts adopted by state legislatures in 1941 had been brought to a total of eighty-four. Mr. Teiser moved the adoption of the following recommendation of the committee:

> That every state bar association be urged to further the passage of state legislation approved by the American Bar Association by the following steps:
>
> *Special Committee.* That a Committee on Uniform State Laws be created for this purpose where that has not already been done.
>
> *Organization.* That the appropriate committee of the state bar association be integrated with other organizations, such as the members of the American Bar Association Committee on State Legislation, the Commissioners on Uniform State Laws and the Commission on Interstate Cooperation, to secure coordination of effort.
>
> *Procedure.* That a legislative program, including drafts of legislative bills and study of their effect on existing law, be completed prior to the elections; that it be brought to the attention of the legislators and the governor immediately thereafter; that arrangements be made for the introduction of the bills at the beginning of each session and that prompt and adequate sponsorship for the bills at each legislative step be secured.
>
> *Revisions and Judicial Rules.* That wherever statutes are undergoing general revision or judicial rules are in preparation, an effort be made to secure the inclusion therein of any state legislation approved by the American Bar Association that may properly be thus adopted.

The resolution was adopted by the House of Delegates.

John Kirkland Clark of New York, as Chairman of the National Conference of Bar Examiners, asked leave to comment briefly on what had been said by Chairman Stanley of the Section of Legal Education. Mr. Clark declared that:

"We have cut down the members of the bar coming in year by year to less than fifty per cent of what they were ten years ago; and there is every prospect, to my mind, that within three or four years the number of applicants will be insufficient to constitute replacement, so that this probably will be the real problem."

Lively Debate as to Report on Public Relations Work

As an item of unfinished business, the report of the Committee on Public Relations, which had been referred by the House to the Board of Governors, for its recommendation, was again placed before the House. Secretary Knight stated:

"The report was referred by the House to the Board of Governors at its session held yesterday, Wednesday. The Board considered the report at a subsequent meeting late yesterday afternoon, and the Board now transmits it back to the House without comment."

Chairman Maguire of the Committee again urged the adoption of its recommendations, which appear in the report of Monday's session of the House. Mr. James L. Shepherd, Jr., of Texas, said that "it seems to me inappropriate to speak of instituting a program of cooperation" between the American Bar Association and the state bar associations, as that has been one of the principal objectives for many years.

Louis E. Wyman, of New Hampshire, expressed doubt as to the employment of somebody "who is to go around the country to represent the views of this Association unrestricted by any committee. I do not believe this Association can get anyone whom it can trust to speak for the Association."

Loyd Wright, of California, supported the committee's report, on the basis of the experience of the State Bar of California. "The lawyers of this country do not realize the tremendous contributions of this Association in Washington," declared Mr. Wright.

Answering Mr. Wyman, L. Stanley Ford, of New Jersey, stated that "It is not contemplated that this representative will be an orator or a public speaker or a handshaker, but rather a public relations counsel. He is not to direct the public relations of this Association but rather to dis-

seminate information concerning the work of the Association."

Judge Lawther again referred to the failure of the Board of Governers to make any recommendation or comment as to the report. Ex-Judge Arthur G. Powell, of Georgia, argued in favor of the report:

"I belong to the conservative element of the Association," said he. "If I were to judge of this report merely on my own intelligence, I would vote against it, because it seems utterly illogical to me that the American Bar Association has to appeal to the public through any side show. But I have seen it in operation. I saw Mr. Maguire come into Atlanta, hold one of these institutes with several high pressure artists like our friend Thompson there, and the results were wonderful."

W. E. Stanley, of Kansas, declared that, "it is high time that this House of Delegates makes up its mind as to what we are going to do or what we are not going to do," as to allocation of the limited Association funds to different projects of the Association.

"This matter was referred to the Board of Governors for their comment," said Mr. Stanley. "They did not see fit to comment upon it or to furnish this House of Delegates with any information, any suggestion concerning it, and yet this motion as it is presented again puts it back to the Board of Governors in their discretion, and they haven't any ideas on the subject; also the discretion of the Budget Committee, and we have no facts with respect to the relationship of our budget to the other activities of the Association. If we have limited funds, let us use those funds like a rifle instead of like a shotgun, scattering all over the lot."

Judge Lawther declared that "it is passing the buck." Chairman Maguire asked Loyd Wright several questions, to bring out the California experience. Ex-Judge Ransom, of New York, expressed the view that "the way to get good public relations in this country is not by hiring public relations counsel," as proposed by Mr. Ford.

"This Association will sell itself to the country," Judge Ransom added, "by the quality of its work, the quality of its advocacy, the ideals of its profession and the service which it renders to the improvement of the administration of justice in all its forms, including the administrative agencies, and to the defense of constitutional guarantees. The jargon of public relations counsellors isn't in any language which goes to the advocacy of human rights. If you want to authorize the hiring of practical and experienced newspaper men to help tell and sell our story, I have sympathy with it."

Statement by Philip J. Wickser of the Budget Committee

References to the finances of the Association led to a signficant statement by Philip J. Wickser, of New York, incoming Chairman of the Budget Committee, a former Chairman of Public Relations Committee. He said:

"Public relations is a big topic. I became convinced after several years of study on it that it has an over-all price, like a great many other things which this Association has attempted to do in its history—the Coordination movement, for instance, which resulted in the formation of this House, had an over-all price which ran very far in excess of what we could hope to get in one year.

"The Association should face the problem in these terms. I think public relations is a very important subject, but I do not think we can get ahead with it by determining it in its relation to one particular year, without knowing what we are going to do about it the next year. You can make $8,000 now very fruitful, and you can waste it by cutting it down next year. It is not a problem which is capable of being framed on an annual basis; it is an over-all problem.

"You know that, ordinarily speaking, the Budget Committee has to exercise a certain amount of discretion in trying to allocate the sums within the total of our income, so that we may bring you a balanced budget. If the sense of the House is that we should spend from our accumulated surplus any number of dollars for public relations or for any other thing, such as national defense, for example, the Budget Committee will effectively carry out the orders of the House.

"The Budget Committee can dip into our surplus, but our understanding is that you do not want surplus dipped into. Therefore, it gets down either to making out as good a relation as we can between the expenditures which are kept alive on substantially the same annual appropriation, and a different kind of expenditure, the expenditures for the efforts which are growing efforts, such as national defense, and such as public relations would be if we ever go anywhere with it.

Waste Through Shift in Emphasis

"The difficulty comes from the money we waste through shifting emphases. There are half a dozen major endeavors of this Association today. Make a list of them, and put them in the order of preference. I don't propose to tell the House what is the most important and the second most important endeavor of this organization, but there is an order amongst them, and what we need is a public opinion within the House, a consensus of where the emphasis of the Association should be placed among these important things when they compete with each other, and that is just what they do.

"The Budget Committee, so far as I can speak for myself on it, believes that the Public Relations Committee should be sustained in its efforts. It recognizes that it is marking time. If you don't want it to mark time, figure out the over-all cost, and put it at the top of the list and we will be with you.

"I am not saying a word against the project. I am entirely for it. I am not characterizing public relations counsel nor ways and means. I am only presenting to you what looks like a budgetary problem, but is really an associational problem of the first importance.

Competent Newspaper Coverage Should Be Continued

"I think, therefore, this year, if it is left to my vote on that committee, my vote will be, unless the House mandates otherwise, to keep that committee alive and to do everything we can to find money to continue the publicity; that is to say, the newspaper relations work, because our press coverage in the last two years has been very much better than it ever was before and we have got to keep it up.

"This year we are going to have a very hard time living within our means. I don't say that to threaten you, but we have got to count on the loss of some members. We have got to hope for even more contributing memberships. At this moment I can't balance that budget or I would have been on this platform before now. When I can balance it I will come and tell you so." (Applause.)

Former President Beardsley Discusses Public Relations

Former President Charles A. Beardsley, of California, declared that,

"It is not the place of this House, and I speak now as a member of the House and in about twenty-four hours I will be no longer a member of the Board, to pick out one thing in the Association activities and put the pressure on the Board and on the Budget Committee to take $8,000 or any other sum for that particular activity, unless this House is also going to assume the responsibility of looking at all of the income of the Association and all of the expenses of the Association, and telling the Board of Governors and the Budget Committee where they are going to get the $8,000.

"Do you want them to dip into the surplus? Do you want them to take the money away from the Section of Legal Education and Admissions to the Bar? Do you want them to take the money away from the cost of the mid-winter meeting of the House of Delegates? Do you want them to take the money away from the cost of a meeting of the state delegates? Where do you want them to get the money?

"In this matter of public relations, I am a little old fashioned. I have a feeling that, after all, the best tonic for public relations was given to Cain by Jehovah in the second generation of man on earth. You will probably recall that Cain was very much concerned about his standing in the world in which he lived. He was particularly concerned because he thought that Abel had a little better standing and, noting the situation, the Lord said unto Cain (Genesis: IV Chapter, 7 Verse): 'If thou doest well, shalt thou not be accepted?'

"Let's do well first, and then, if we have enough money to employ somebody to tell them about it, let's do it, but if we do well by the public, that itself is news, and we don't need to pay anybody to tell the public about it."

Sylvester C. Smith, Jr., of New Jersey, a member of the Committee on Public Relations and the Budget Committee, argued for the resolution on the grounds of its discretionary character, in that any appropriation and employment would be under the control of the Board of Governors.

John Kirkland Clark, of New York, moved as an amendment that the report be referred back to the Board of Governors with a request for a recommendation "so that we may know where the Board stands, having this authority, in the light of our financial position."

Chairman Maguire and Guy R. Crump, of California, opposed the motion to refer. "This House is the operating, policy-making body of this Association," declared Judge Crump. "I see no reason why we should stultify ourselves by again asking the Board for information."

Mr. Clark's motion to refer was then put to a vote. It failed of adoption. The resolution emanating from the committee was then adopted by the House on a rising vote of 64 for and 40 against, with various members of the House not voting.

The brief report of the Section of Public Utility Law (George Gibson, of Virginia, Chairman) was submitted by William Clark Mason of Philadelphia, and was received and filed.

House Action on Resolutions Adopted by the Assembly

At this juncture, the House took up the resolutions which had been introduced by individual members on the floor of the Assembly, heard and reported on by the Resolutions Committee headed by Judge Sumners of Texas, as Chairman, and adopted by the Assembly. Secretary Knight certified that four such resolutions had been passed by the Assembly. Their text appeared in the report of the proceedings of the Thursday session of the Assembly, in the November JOURNAL.

Resolution Number 7, by Murray Shoemaker, of Ohio, expressing sympathy for the bar of Paris, was concurred in and adopted by the House, on motion of Roy E. Willy, of South Dakota.

Resolution No. 11, by Mr. Gilford, of California, in favor of the creation of a Junior Bar Conference in the Inter-American Bar Association, was concurred in and adopted by the House, on motion of W. Roy Vallance, of the District of Columbia.

Resolution No. 13, by Charles Ruzicka, of Maryland, for a special committee to study the term of office of the President of the United States, was concurred in and adopted by the House, on motion of ex-Judge Lawther, of Texas.

Resolution No. 14, by Loyd Wright, of California, for bar association efforts to maintain the traditional independence of the three departments of government, was concurred in and adopted by the House, on motion of Frank H. Haskell, of Maine.

Oscar C. Hull, of Michigan, presented the report of the Committee on Commerce, which was received. His oral statement was principally as to a new and uniform law as to sales, on which the committee did not ask for House action.

Chairman Robert N. Miller, of the District of Columbia, asked that the report of the Committee on Communications be received and filed.

The Committee on Printing, Publications, and Indexing, which the Board of Governors abolished on the committee's recommendation, rendered no report.

Distinguished Visitors from Latin America Are Presented

When Chairman John T. Vance, of the District of Columbia, was recognized for the report of the Section of International and Comparative Law, he first asked for and received unanimous consent to introduce to the House two distinguished colleagues from Latin America. The following thereupon took place:

MR. VANCE: We have the pleasure of having with us Dr. Manuel Fernandez Superveille, President of the Cuban Bar Association, first President of the Inter-American Bar Association, and elected Honorary President at the first meeting when he was succeeded by a lawyer from Buenos Aires, Dr. Honorio Silgueira. Dr. Manuel Fernandez Superveille, a distinguished colleague from Cuba. (The House arose and applauded.)

CHAIRMAN GAY: I am sure, gentlemen, I express the sentiments of the House when I say we are glad to have you here.

MR. VANCE: I should like also to introduce a gentleman who has come all the way from Chile, a colleague from the Santiago (Chile) Bar, Dr. Mario Tagle Valdés, who is a distinguished lawyer in his country, is recognized abroad, and is on a trip of study and pleasure throughout the United States and North America. I have the great pleasure of presenting Dr. Mario Tagle Valdés. (The House arose and applauded.)

CHAIRMAN GAY: I am sure I also express the sentiments of the House when I say we are most happy to have you with us.

Debate on Report as to International and Comparative Law

After submitting his report for the Section, Chairman Vance moved the adoption of the following four resolutions, as a whole:

First: That, the Association favors this country's adherence to a convention to be entered into by all the states of the Americas making provision for a simple, expeditious, effective and inexpensive system whereby the tribunals of each country can procure the service of documents and obtain evidence within the territory of the others; procure information on subjects of law of the other states; and assure in all such states, the recognition and execution of final judgments according to the recognized principles of international law;

Second: That this Association approve the creation of an Inter-American Academy of International and Comparative Law, the purpose of which shall be to promote and develop studies on those subjects, especially with reference to matters which affect inter-American solidarity; the Academy shall be organized by a Commission of seven members to be appointed by the Executive Committee of the Inter-American Bar Association; the Commission shall have full powers for the promulgation of orders, rules and regulations by which the Academy is to be governed and to decide all matters in connection with its functioning, as well as to fill vacancies occurring therein; the Academy is to be financed through registration and matriculation fees, donations and contributions made to it by the American governments, and by private and quasi-official institutions that may have an interest in developing such studies;

Third: That the Convention on the Protection of Literary and Artistic Property, signed at Buenos Aires on August 10, 1910, and ratified by the Congress of the United States on March 12, 1911, be amended in accordance with the changes suggested by the Eighth International Conference on American States;

Fourth: That the Association endorse the resolution approved by the Eighth American Scientific Congress in May, 1940, recommending the translation into other languages of the American Republics the Restatement of the Law of the United States of America as approved by the American Law Institute;

That the translations, in addition to copious explanatory footnotes, contain brief historical and analytical introductions on the origin and nature of the corresponding Latin-American and Anglo-American legal concepts, principles and institutions;

That measures be enacted to facilitate the completion of the important tasks relative to the unification of commercial and civil law and the uniformity and unification of legislation entrusted to official agencies by the International Conference of American States;

That as soon as the volume on Conflict of Laws of the American Law Institute be translated, measures be taken to cooperate in a detailed comparative study for the purpose of examining the extent to which it can be reconciled with the Bustamante Code of Private International Law;

That if requested by the American Law Institute, the Chairman of the Section be authorized to appoint a committee to cooperate in the actual work.

Questions Are Raised as to the Third Resolution

Speaking for the Patent, Trade-Mark and Copyright Section as to the third resolution, Roy C. Hackley, Jr., of California, arose "to call attention of the House to the fact that there appear to be among the resolutions at least two, possibly three, which should have been referred to the Section of Patent, Trade-Mark and Copyright Law, before consideration by this House. The resolutions are those which deal expressly with the question of copyright in the United States and do not deal exclusively with the subject of international or comparative law.

"The resolutions to which I have reference include one which is proposed to be adopted by this House, that the Association favor the adherence to an International Convention which has been before this House on at least three previous occasions, and in each instance the House has taken a view contrary to the recommendation of the International and Comparative Law Section."

MR. VANCE: I am not asking the House of Delegates to discuss anything except the first four resolutions, none of which concerns the matter being now discussed by Mr. Hackley.

MR. HACKLEY: Mr. Vance, do any of these four resolutions relate to the question of copyright?

MR. VANCE: As the members and yourself can easily see, the third relates to the Convention on Protection of Literary and Artistic Property, signed at Buenos Aires on August 10, 1910, and ratified by the Congress, and so forth.

MR. HACKLEY: That convention is directed to the subject of copyright, has not been studied or presented to the Section of Copyright of this Association, the Patent, Trade-Mark and Copyright Section, and I move as a substitute motion that the question of the third resolution of the report of the Section of International and Comparative Law be resubmitted to the Section of International and Comparative Law to be discussed with the Section of Patent,

Trade-Mark and Copyright Law, in order that a complete report on all phases relating to domestic and foreign copyright may be placed before this House.

Mr. Hackley's Substitute Motion Is Adopted

Mr. Hackley's motion for joint discussion between the two Sections was seconded. Mr. Smith, of New Jersey, asked a separate vote on the four resolutions. The Board of Governors had transmitted them without comment. The first, second, and fourth resolutions were thereupon put to a vote and were adopted by the House.

Chairman Vance, Mr. Hackley, Judge Lawther and Roy E. Willy then debated the third resolution. Mr. Hackley's substitute motion was put to a vote and was adopted by the House.

Further Resolutions from the Section

Chairman Vance then submitted an additional resolution, which had been passed and recommended by the Section:

> Resolved, first, that the International Pacific Salmon Fisheries Commission be empowered to regulate fishing gear and promulgate regulations respecting Saaki salmon within its jurisdiction as it may decide, and that the eight-year period now prescribed be abrogated by an appropriate method; and
>
> That the Department of State be advised of this resolution.

Mr. Maguire, of Oregon, and Mr. Crump, of California, brought out the fact that the resolution had not been submitted to the Board of Governors and that copies were not on the desks of the members of the House. Mr. Willy, of South Dakota, moved that action on this resolution be deferred until the next meeting of the House. This motion was carried.

Chairman Vance then said that he had a further resolution in relation to the International Convention of the Copyright Union for the Protection of Literary and Artistic Work as revised and signed at Rome on June 2, 1928. In view of the action of the House on the former resolution relating to copyright, he moved that the resolution be referred back to the Section of International and Comparative Law to study further in collaboration with the Section of Patent, Trade-Mark and Copyright Law. This motion was carried.

Report as to Facilities of the Law Library of Congress

Murray M. Shoemaker, of Ohio, for the Committee on Facilities of the Law Library of Congress, gave its report. He moved the following resolution:

> Resolved, that the American Bar Association express to the Congress of the United States its appreciation for the increasing support of the Law Library of Congress.

The Board of Governors had recommended approval of this resolution. The House adopted it.

Mr. Shoemaker moved also the following:

> Resolved, that the American Bar Association endorse Resolution XII of the First Conference of the Inter-American Bar Association recommending "the establishment of national centers of legal documentation in the countries which have either present or future members of the Association."

Mr. Shoemaker moved further:

> That the Committee be authorized to continue its cooperation with the Congress in its development of the Law Library of Congress.

This had been approved by the Board of Governors and was adopted by the House.

President Lashly then made a brief statement as to the work which the Association, through the Headquarters Staff, with the aid of officers and many members of the Association, had lately carried on in the law schools of the United States.

The report of the Section of Criminal Law was submitted by Chairman James J. Robinson, of Indiana, and was received.

Ex-Judge Laurance M. Hyde, of Missouri, gave the report of the activities of the Section of Judicial Administration, which said that it had obtained 60 new members for the Association. The Section is strongly supporting the work of Judge Parker's Committee on Improving the Administration of Justice. The report was received.

Alvin Richards, of Oklahoma, as Chairman of the Section of Mineral Law, submitted its report, which was received by the House.

Report of Section of Patent, Trade-Mark and Copyright Law

Debate and difficulties arose as to some of the recommendations in the report of the Section of Patent, Trade-Mark and Copyright Law, submitted by Loyd H. Sutton, of the District of Columbia, its Chairman. Chairman Sutton moved the adoption of the Section's Resolution No. 1:

> That the Association disapproves in principle H.R. 3360 and S. 895 (identical bills).

Concerning it he said that "these bills curtail the power of the court in granting injunctions in patent litigation, and are considered unwise and unnecessary, particularly in view of the right of eminent domain."

Chairman Gay asked Roy E. Willy to report the action of the House Committee on the Section's resolutions. Mr. Willy replied that: "I want to say in frankness to the Chairman of the Section that the members of your sub-committee have very little knowledge about patents, copyrights and trade-marks. We do recommend, with reference to this resolution as well as the other ten or eleven resolutions which follow, that we have checked them all as to form, that they do not contravene any of the established rules or practices of the House. We submit them without recommendation, but we do second the adoption of all of the resolutions."

Resolutions Develop Debate as to House Action

The first resolution was then adopted. Chairman Sutton then moved:

> Resolution No. 2: The Association disapproves in principle S. 1132, H.R. 3812, H.R. 3153, and H.R. 3366.

As to it he said that "These four bills are similar in that they propose to set up additional commissions in Washington for the purpose of doing things which the Government is already doing, and doing well. We consider them unnecessary."

Resolution No. 2 was adopted by the House.

Mr. Smith, of New Jersey, then said, in part: "This is one branch of legislation where I think we ought to permit the position of the Section to be expressed. I think we are committing ourselves to something about which we know nothing. I would like to suggest that the Section be permitted to present its position to the proper committees of Congress as the Section's position on this legislation."

Chairman Sutton raised the point "whether that is consistent with the by-laws of the organization which would require that before any section or committee may appear before any committee of Congress or body, it must have the approval of the House of Delegates."

The Problem of Reports in Specialized Fields of Law is Stressed

Chairman George M. Morris, of the Section of Taxation, recognized the importance of the practical situation, as to his own and other Sections dealing only with specialized fields of law, rather than the work of the general practitioner.

"There must be developed," he said, "some method of handling these Section reports which recommend legislation which is more intelligent than the method we have now.

"The character of these recommendations is known to so few of us, that it is very difficult to pass upon them intelligently, and we have restricted our committees such as Mr. Willy's, and it seems to me rather properly so, to saying that there is nothing that they can see in the form or in the tradition of the House, or the principles of the Association, which is violated.

"I know that in the recommendations of the Tax Section that is even more true. I am going to be in here tomorrow morning with sixteen pages of recommendations, some of them ten or twelve pages, because of the prescription of the House rules and the rules of the Association, of bills and parts of bills which this Tax Section wants to have taken up, and taken up immediately."

Willis Smith, of North Carolina, said that: "It would seem to me that this House can never hope to comprehend all of the specialized subjects. It therefore seems to me that in some instances—and this is one of them—the Association would allow the Section to express its views in the name of the Section of this Association. Manifestly, that comes nearer representing the real situation than for us sitting here voting on something about which we know nothing."

Robert F. Maguire, of Oregon, stated that we should not start "on a precedent of giving a blank approval. It seems to me far better to have the Chairman of the Section inform the House, in general language, of the purport of each proposal. Then we can vote on them as seems best."

Further Debate as to Resolutions in Specialized Fields

Chairman Sutton then moved:

Resolution No. 3: That the Association approves in principle H.R. 5258.

As to it he stated that "This bill provides for disclaiming invalid patent claims, for validating patents to the extent they contain valid claims, and limits relitigation of claims held invalid."

Charles Markell, of Maryland, stated his inability to vote on the resolution. Mr. Seasongood, of Ohio, asked that all of the resolutions be referred back to the House Committee "for a real report on the subject."

Mr. Wheeler, of Rhode Island, made a point of order that copies of the bill were not on the members' desks. Chairman Gay, of the House, ruled that Section 20 of the By-laws does not apply to action as to the advisability or inadvisability of bills introduced, printed, and pending in the Congress.

Mr. Seasongood then insisted on his motion to refer Section Resolutions 3 to 11 back to the House Committee on Section Reports. Carl B. Rix, of Wisconsin, urged that the House be "tolerant" as to Section recommendations in specialized fields.

"The House should concede something to the committees, the Sections, that have worked all the year on this thing," declared Judge Lawther. "They probably have a special knowledge of the matter, and we should concede something to their judgment. I have voted here many times on things I did not know a damned thing about, but I knew the committee knew all about it. I think when a committee has spent time and has a special knowledge about a particular subject and comes in here with a report, as far as I am concerned I am willing to follow the committee."

Mr. Seasongood argued further for his motion to refer. Mr. Morris agreed with Judge Lawther that until we have a better machinery, "we should take the Section on faith." The motion to refer was then put to a vote, and was rejected by the House.

Memorial for Judge Lumpkin Is Presented

The House then suspended its regular order of business, to hear the memorials prepared as to two distinguished members of the House who had recently died. They were eloquent and moving tributes to beloved and devoted members of the Association and the House.

Former Governor John M. Slaton, of Georgia, gave the memorial tribute to Judge Lumpkin:

"The subject of a famous lecture was 'The Numerals'. They declared distances, calculated values, determined weights, but their real worth is not understood until they measure the years of life of a noble man.

"Alva Moore Lumpkin, a member of this House of Delegates as State Delegate from South Carolina, died on August 1, 1941. He was born November 13th, 1886, in Milledgeville, Georgia, the old capital of the state, and moved to Columbia, South Carolina.

"In his adopted state his activities covered many fields of human interest. He was a member of the State House of Representatives, Special Assistant Attorney General, a member of the Board of Pardons, Acting Associate Justice of the Supreme Court. He was President of the South

Carolina Bar Association, President of the Columbia Chamber of Commerce, a member of the Conciliation Commission for advancement of peace between the United States and Uruguay, and his connection with fraternal and social organizations was extensive.

"But the practice of the law was that field of endeavor in which his splendid talents found their greatest opportunity. Admitted to the bar of South Carolina, he rapidly rose to a leadership in his profession, being a member of the conspicuous firm of Thomas, Lumpkin and Cain when called to the Bench.

"In Georgia his family name is brilliantly associated with the judicial and political history of the state. Governor Wilson Lumpkin, a member of it, was Chief Executive. Joseph Henry Lumpkin was the first Chief Justice of the Supreme Court, and his decisions disclosed the extraordinary legal ability of their author. Three of the family have adorned that highest court, Samuel Lumpkin, and a grandson of the first Chief Justice, Joseph Henry Lumpkin. They, with others of the family, presided as judges of trial courts, and everywhere displayed judicial qualities of the highest order.

"Ancestry, tradition and natural ability directed him to the law. He engaged in its practice with the greatest success. Clients recognized his sound judgment and sought it. Large business learned the value of his experience and broad vision, and knowledge of public affairs, and made use of them.

"The poor and unfortunate found in him an honest, sympathetic, and courageous representative, and their confidence was never misplaced.

"From the conflicts of the courtroom he was appointed to the federal bench, where he ably enforced the law and commanded the respect of litigant and advocate. In the trial of a case for violation of some new federal statute the defendants were convicted, and the Government recommended a fine of $10,000. Judge Lumpkin, in pronouncing sentence, said: "You are guilty, but the violation was technical. I impose a fine of $100."

"It was while district judge, and after a service of several years, he was appointed United States Senator from South Carolina to succeed Senator Byrnes, who had been appointed to the United States Supreme Bench.

"In the Senate he had become a member of the powerful Judiciary and Appropriations Committees.

"An easy mode of retiring from the federal bench to join his brother lawyers was to accept for a brief interval a seat in the Senate. The forum of the courtroom was where he experienced his greatest pleasure, and had he lived, he would have returned to the practice of his profession. He knew, in the language of Chief Justice Hughes, that 'work condemns a man to perpetual youth.'

"In the latter part of July, 1941, he was stricken with a fatal malady, which caused his speedy death. Surviving him are his beloved wife and two children.

"Thus ended the career of a patriotic citizen, a great lawyer, a distinguished diplomat, an able judge, a conspicuous Senator.

"But these exalted positions do not reveal him at his best. There is something infinitely superior to the distinction of any office, however exalted, or any achievement, however glorious.

" 'It is more to be than to accomplish.'

"The man is greater than any work he had done, and it is as a man we remember Alva M. Lumpkin at his best. In its noblest sense, Senator Lumpkin was a Conservative. He recognized that 'the dead of a single generation may have had no greater wisdom than the living one, but the dead of many generations may have at least a greater collective experience.' His clear eyes were not misled by sophistries, however expressed in fervid rhetoric.

"In this restless struggle for change and abandonment of old ideals, faiths and traditions, he never aligned himself with the doctrinaire and the faddist. That vision which he exalted is the possession of the thinker, the scholar, the true prophet, who beholds with sight instructed and clarified by the experience of ages, the result of things.

"Senator Lumpkin lived upon the altitudes, and maintained the standards of gentle forebears, whose heritage he recognized as imposing an obligation and not a privilege.

"His intercourse with people maintained the importance of manners, and the urbanity by which his daily relations were marked belonged to the time when 'knighthood was in flower.' He regarded courtliness, a smile, a wave of the hand, a few steps out of the way, a batch of conventional good wishes—they drop sufficient pleasantness into the fluctuating scales of ordinary experience to make the day a happy one.

"His friends knew him for his loyalty, sincerity, and kindliness. No censorious criticism of his fellows stained his thoughts, nor embittered his tongue.

"For human frailties he had a forgiveness, which brought him within the Master's blessing.

"As a member of this body, his attendance was regular, his influence potent, and his convictions were expressed in his votes.

"Great in intellect, noble in nature, true in friendship, courageous in life, as we present him in a memorial which inadequately portrays the subject, we exclaim with Miranda in Shakespeare:

" 'How beauteous mankind is;
O what a brave new world that had
such people in it!' "

Memorial of Judge Jesse A. Miller Is Presented

Chairman Gay next recognized Ex-Judge Thomas J. Guthrie, of Iowa, to give the memorial tribute to Ex-Judge Jesse A. Miller, of that State. Judge Guthrie said:

"Jesse A. Miller was born August 8, 1869, in Johnson County, Iowa, and graduated from the State University of Iowa in 1891. His class, composed of men who have distinguished themselves, held their fiftieth annual reunion in June of this year.

"He was married May 15, 1895, to Emily Williston Magoun, daughter of the President of Grinnell College, and there were born to that union three sons, who survive him: Frederic, now Chief Justice of the Supreme Court of Iowa; Alexander, a member of his father's firm; and Earl, an attorney with an insurance company. He is also survived by a brother, Oliver H. Miller, a practicing attorney of Des Moines—all of whom are active members of this Association.

"Judge Miller served his state as Assistant Attorney General, County Attorney, judge of the district court and President of the Polk County and State Bar Associations.

"For twenty-five years he was a member of this Association, and during that time never missed an annual meeting. He was a member of the General Council for six years, of the Executive Committee three years, and the House of Delegates from 1939 to the time of his death, August 26, 1941. He was a charter member of the Law Institute, and he assisted in the organization of the Insurance Section of the American Bar Association and served as its Secretary and Chairman in 1934 and 1936, respectively. He was also a member of the Conference of Commissioners on Uniform Laws, and was also its President for three years.

"He never shirked any duty he was called upon to perform. He did not confine himself to his legal practice alone, but was interested in everything that meant the furtherance of the interests of the community, and he was eager at all times to do everything in his power to promote the welfare of the state and the nation, and he loved his country and its institutions. He took a very active part in the war activities of 1917 and 1918. Two of his sons saw active service in this conflict. His father was a lieutenant colonel in the Civil War.

"Fast in his friendships, challenging as an opponent, powerful as an advocate, sincere, true and fearless as his clients' champion, able in his analysis of law, he has enriched the heritage of the law and has left to his fellow members of the bar the memory of a high ideal. He practiced law not as a business, but as a profession and as a disciple of the profession for which he had reverence and respect.

"His voice and his counsel will be missed by this Association."

Chairman Gay ordered that these two memorials be made a part of the records of the House and the Association. At the suggestion of Governor Slaton, the House then arose and stood in silent tribute, in memory of its deceased members.

Discussion of the Report of the Patent Section Is Resumed

In explanation of Resolution No. 3, Chairman Sutton of the Section stated that "it is the law that if one claim of a patent is held to be invalid, the entire patent is invalid, even as to claims which had not been litigated, unless within a reasonable time, which the Supreme Court has construed to be ninety days, a disclaimer is filed. Alternatively, the patentee may take his chance on going into another circuit and try to sustain those same claims over again, and if he loses in the second circuit, he can go into the third circuit, and so on, theoretically through all ten circuits. The disclaimer statute by H.R. 5258 is revised so as to preserve the validity of those claims which are not held to be invalid, notwithstanding the absence of a disclaimer, and to limit the litigation of claims held to be invalid to not more than two circuits."

He added that the provision as to two circuits was "Because the court in a second circuit may reach a different opinion, and then it can be certified to the Supreme Court to resolve the difference of opinion between the two circuits."

Resolution No. 3 was thereupon adopted by the House. Chairman Sutton then offered:

> Resolution No. 4: That the Association disapproves H. R. 4645 except for subsections a, b, c, and f of Section 1.

He stated that "This bill is intended to crystallize, and in some respects modify, the practice with respect to patent suits before the Court of Claims. The changes are in many respects detailed and technical. In so far as the paragraphs in question simplify procedure, the Section is in favor of them, and that is the character of sections a, b, c, and f. The remaining sections are considered unwise or unnecessary.

"For example, they impose upon the Government the burden of finding out whether it is infringing a patent and of keeping records in anticipation of a charge by a patentee that it may some time be held for infringement. It has definite limitations upon what the Government may do by way of defense. These are considered unfair in the Government, and unwise."

Resolution No. 4 was thereupon put to a vote of the House, and was carried.

A Substitute Motion to Refer Is Defeated

On behalf of the Section there was next offered:

> Resolution No. 5: That the Association approves in principle H. R. 5534.

Chairman Sutton stated that "This is a measure that has been drawn by the Patent Office as an *ad interim* measure, to take care of the rights of foreign inventors which might otherwise become lost during the pendency of the present emergency. At the end of the first World War, what was known as the Nolan Act was passed, to preserve the rights of foreign inventors seeking patent protection in the United States upon the condition that reciprocal privileges were afforded the United States inventors in foreign countries.

"The present measure is also conditioned upon there being these same reciprocal provisions in foreign laws, and it seeks to safeguard and preserve the rights of foreign inventors who may not be able to file in the United States within the year because of orders of secrecy of their own Government and the like, and they may still get a valid patent in the United States".

Mr. Vance moved as a substitute that the resolution be "referred to the Section of International and

Comparative Law on the ground that it refers to and seeks to protect the rights of foreign inventors".

The substitute motion was defeated by the House, and the Section's Resolution No. 5 was adopted. Chairman Sutton then offered:

Question is Again Raised as to Basis of House Action

Resolution No. 6: That the Association recommends to the Commissioner of Patents that Rule 68 of the Rules of Practice of the United States Patent Office be amended by adding at the end of the first sentence thereof:
'and he may amend as often as the Examiner presents new references or new reasons for rejection'.

In explanation, Mr. Sutton said that, "The present rule in the Patent Office, which is by statutory effect the same effect as a statute, provides that the applicant may amend, but it is unclear and indefinite as to how long he may amend. This is an effort to clarify the rule to preserve the applicant's right and determine just what may happen before appeal. In other words, it provides that as long as there are no reasons for rejection, the applicant may be heard by the Patent Office by way of further revision."

Mr. Markell, of Maryland, thereupon protested that, "This resolution is typical of the danger of the American Bar Association blindly adopting a technical recommendation on a question that has technical and also broad public policy involved. It has long been a scandal in patent law and in the use of patents, that patents have been protected in the Patent Office as long as they formerly were. The Patent Office is trying to reduce that period of protraction. That is an ultra-technical matter. Any patent lawyer who wants to take the matter to the Patent Office to have this rule changed, can go there, but I don't think he ought to be blindly given the approval of the American Bar Association on such a technical matter."

W. Roy Vallance supported Mr. Markell's protest, and declared that the House "ought not to go on record in support of this resolution." Nathan P. Avery, of Massachusetts, took a similar view. Mr. Rix, of Wisconsin, asked questions in support of the resolution, which was then put to a vote and adopted by the House. Chairman Sutton then offered:

Resolution No. 7: That it is the sense of the American Bar Association that the encouragement of invention and technological improvements is essential to our national defense and our economic well being; that laws which have the effect of decreasing the reward to inventors and those who finance new developments, at a time when the increased complexity of science and industry has made the development of inventions vastly more costly and more hazardous, are to be deprecated; and that our national tax policy should be based upon the principle that the progress of science and the useful arts can be promoted only by a minimizing of the difficulties of new enterprise.

In support of it he said that, "The Section feels the need of a resolution stating a matter of policy of this character because of recurrent proposals that are calculated to discourage inventors. There are recurrent proposals with respect to what shall be done with the moneys earned by inventors as licensors, whether their license fees are entitled to some sort of recognition of a diminishing piece of property in that the patent dies in seventeen years."

Mr. Seasongood moved that Resolution No. 7 be referred to the Section on Taxation. This was put to a vote and was defeated. Resolution No. 7 was thereupon adopted by the House. Chairman Sutton then offered:

Resolution as to Copyright Fees is Defeated

Resolution No. 8: That the Association disapproves H. R. No. 2598.

In support of this action, he explained that, "This is in the field of copyright law. There are gradations of copyright fees running from one dollar to six dollars. The proposal is not a mere effort to reduce a six-dollar fee to a two-dollar fee, but it will impose a heavy burden upon a wide variety of copyrights for which the present fee is one dollar. The Section feels that this is an undesirable increase in fee."

Mr. Markell, of Maryland, protested that, "At the risk of being tedious, I submit that it is the height of absurdity for the American Bar Association to express an opinion whether a fee ought to be one dollar or two dollars."

Resolution No. 8 was put to a vote, and was rejected by the House. Whereupon Chairman Sutton offered:

Resolution No. 9: That the Association disapproves in principle H. R. 4619.

Concerning it Mr. Sutton said that, "This bill is concerned with a matter in copyright, more particularly concerned with the making of records of radio transmissions and selling those records for profit. It requires that anyone in order to obtain a license for the sale of such records, must get the consent of all participators in the performance, except in the case of orchestras, when the leader of the orchestra may give the consent.

"There are many weaknesses and complexities in the bill, but one point in particular stands out. If there are members of the public, as in the quiz program, for example, or in a baseball report, or in any one of a very large number of a type of recording of radio transmissions, and most radio transmissions are recorded, it will be impossible to carry into effect. It does not change the fundamental law as to what is an infringement. It does make criminal certain acts in the copyright law. It is considered unnecessarily complex, unreasonable in its requirement, that anyone whose voice comes over the radio must consent to a record being sold of the performance."

Mr. Vallance moved that the resolution be referred to the Section of Criminal Law, as the bill "deals with a matter of Criminal Law." The motion to refer was defeated. The Resolution was thereupon favored by a vote of those present in the House. Chairman Gay recognized the absence of a quorum, owing to the lateness of the hour, and ruled that Section Resolutions Nos. 8 and 9 would be voted on again Friday morning.

Before the recess, Paul F. Hannah, of the District of Columbia, was recognized to offer a resolution with

respect to cooperation with the Citizen Educational Service in sponsoring the national observance of the 150th anniversary of the Bill of Rights. The resolution was referred to the Committee on Draft, for consideration and report.

Report of the Board of Elections

William P. MacCracken, Jr., gave the report of the Board of Elections, its Chairman, Judge Edward T. Fairchild, of the Wisconsin Supreme Court, having been called home to resume his judicial work. In addition to rendering the formal report, Mr. MacCracken said, in part:

"There is one recommendation in the report which does not require action but which I think may appeal to you in the interests of economy. Two years ago we had a contest for four State Delegates. Last year and this year the contests were limited to three. If the Constitution were amended (and we suggest that you consider presenting an amendment next year), the number of ballots that would have to be mailed out would be cut down to about one-fourth; in other words, this year we sent out nearly twelve thousand ballots. There were only three contests, and to send out the ballots where there were two or more nominees would have required less than three thousand ballots. In the interest of economy and as a practical proposition, because there has never been a successful contest where only one person is nominated, it would probably be just as well if the Constitution provided that the nominating petition should be considered the equivalent of an election, and the Board empowered so to declare.

"In conclusion the Board again desires to record its appreciation of the loyal and intelligent services rendered by the various members of the Headquarters Staff who have assisted the Board in the performance of its duties."

At 5:45 o'clock the third session of the House recessed until the following morning.

FOURTH SESSION

The consideration and dispatch of a great volume of business were crowded into the fourth and final session of the House in Indianapolis. A dozen recommendations of the Section of Taxation were adopted. The first directors of the Association Endowment were selected. The proposed bill to revise the Bankruptcy Act was debated, and a substitute resolution was passed. The proposed creation of a new Committee on Civil Service was defeated. President Lashly made an important statement as to the work of the Committee on Advancement and Co-ordination of the Association's work in aid of National Defense. Chairman Wickser of the Budget Committee was heartily applauded when he reported a balanced budget. The House decided to hold a mid-winter meeting as heretofore. Thomas B. Gay concluded three years of impressive and impartial service as Chairman of the House of Delegates. The new officers were elected, and Guy R. Crump was installed as Chairman of the House. A great deal of other important business was transacted.

AT its fourth and final session, after the formalities as to quorum and record, Resolution No. 8, from the Section on Patent, Trade-Mark and Copyright Law, was again placed before the House. After some questions and discussion, participated in by Messrs. Clark of New York and Myers of Pennsylvania, and by Chairman Sutton of the Section, Resolution No. 8 was again put to a vote, and was again rejected by the House.

Resolution No. 9 was also submitted again, and was stated to have been approved by the Section without opposition. Resolution No. 9 was thereupon adopted by the House. Chairman Sutton then offered:

> Resolution No. 10: That the Association disapproves H.R. 4703.

In explanation Mr. Sutton said that:

"The Supreme Court interpreted the requirement of the present statute, that the application for registration be filed promptly, as satisfied, although the application for registration was not filed for fourteen months after publication. In the last Congress, H.R. 5319 was introduced which required that there be an application within sixty days of publication for United States authors, and one hundred and twenty days for foreign authors. It also protected those who had failed to file promptly under the Supreme Court ruling.

"This Association approved that bill. Then the present bill, H.R. 4703, requires that the application for registration be filed concurrently with publication, and leaves it up to the Registrar of Copyrights, for example, to refuse to register a copyright that is mailed two days, five days, a week, after publication. Also, it fails to afford any protection for those who may have proceeded in the past under the Supreme Court ruling. It is more drastic, therefore, than the bill previously approved by this Association, and the Section recommends that the present bill be disapproved to the extent that it fails to accord with what has previously been approved. The action of the Section was unanimous."

Further Resolutions from the Section of Patent Law

The motion to adopt the Section's Resolution No. 10 was put to a vote and was carried by the House. Chairman Sutton then moved:

> Resolution No. 11: That the Association approves in principle H.R. 5461, provided it be amended to incorporate the changes shown on the attached sheets, and disapproves H.R. 1424 in principle as inconsistent with H.R. 5461 as amended.

In support of the recommendation

of the majority in the Section, he said:

"This is a bill some fifty pages long, the purpose of which is to codify and to revise in some respects the trade-mark law. A bill known as H.R. 102, or its counterpart, has already passed the Senate. This is a bill that has been introduced into the House to incorporate therein the proposals of groups, including the National Association of Manufacturers, the Label Manufacturers Association, Association of Box Manufacturers, and various other industrial and commercial groups, and departs in substantial extent from the bill that has passed the Senate.

"I am advised that Mr. Lanham, the Chairman of the Sub-Committee of the House, has deferred hearings on H.R. 5461 until the Bar Association shall have an opportunity to express its opinion, but that hearings are contemplated within the next thirty days. The bill, in the opinion of the Section by a very substantial majority, is the best codification and revision of the trade-mark laws that has yet been submitted.

"The Section adopted this resolution roughly on a vote of two to one. Before the resolution itself was adopted, the various amendments that are before you were all taken up; and the opinion was very nearly unanimous that if H.R. 5461 is to be adopted at all, all of these amendments should be incorporated. The debate was whether or not H.R. 5461 as so amended should be adopted.

"There are those in the Section whom, for purposes of relativity, I will call the radical ones, who think that this bill does not go far enough, that there should be something like a granting of patent under a trade-mark. There are those who, on the other hand, for purposes of relationship, I will say are the conservatives, who feel that this bill goes too far. H.R. 1424 is being fathered by them. They think that we should turn around and go backward from what has been done since 1905, and go back more nearly to the common law trade-mark.

"But the Section, by a vote of roughly two to one, and those whom I will characterize as the moderates, feel that H.R. 5461 is the preferred bill, but a golden mean as it stands. There are only three of the proposed amendments to H.R. 5461 to which I need refer, because the others have been appended merely as clarifying revisions which do not affect the principle. There are three sections of the Act that should be revised, Sections 15, 23, and 33. Section 32 has been worked out in its present form by conference with the Box Manufacturers and Label Manufacturers, and puts in a safeguard which H.R. 5461, in their opinion, does not provide; to wit, if a trade-mark infringer should go to a box manufacturer and have him make up a set of boxes with that trade-mark appearing on the surface of the box, if he were perfectly innocent in the matter, he should not be held a tort feasor. The present bill does not afford him adequate protection.

"The revision of Section 52 is for the purpose of saving him if in good faith he is simply filling an order, and the same also applies in the case of labels and other cartons and other packages, wrappers, and such manufactures. Sections 15 and 33 should be considered together, because they are both concerned with the same thing.

"Our Section last September in Philadelphia approved in principle the idea of incontestability; that is, that after a man has used a trade-mark for five years, his trade-mark thereafter should be incontestable, assuming that the trade-mark is otherwise valid. This question of incontestability is debatable. The Section by a vote that is very nearly unanimous, said that if H.R. 5461 is to be passed, it should contain the revised Sections 15 and 33, because they are intended to afford greater protection and reserve better rights, if I may so express it, than the present draft of H.R. 5461. They also afford better protection to third parties who may have adverse rights."

The Section's Resolution No. 11 was then put to a vote, and was adopted by the House.

A Further Suggestion Is Made as to the Offering of Resolutions

Chairman John Kirkland Clark, of the Committee on Draft, reported to the House that the Committee was "unanimously of the opinion that where a Section brings in resolutions which are not embodied in the preliminary reports, there should be submitted, in addition to the mere resolution or what the resolution means, a brief statement of the arguments bearing upon it; and it was thought that perhaps the most desirable way to accomplish this would be to have a resolution expressing that sentiment as the sentiment of the House, and ask the appropriate Committee to draft a rule which may be taken up at the next session for that purpose."

Mr. Clark accordingly moved "that it is the sentiment of the House that where a Section or a committee brings in resolutions which are not included in the preliminary statement for the meeting, there should be furnished with the proposed resolution, in addition to an explanation of what it means and concerns itself with, a brief statement as to the arguments on the resolution."

The motion was supported by W. E. Stanley, of Kansas, and was adopted by the House.

Incorporators of Association Endowment Are Selected

As a matter of unfinished business, Chairman Gay recognized Mr. Barkdull, of Ohio, to present the recommendations of the Ways and Means Committee as to five members who will be named in the Articles of Incorporation as the incorporators and first directors of the American Bar Association Endowment. Mr. Barkdull submitted the following:

For the one-year term: R. Allen Stephens, of Illinois.

For the two-year term: George L. Buist, of South Carolina.

For the three-year term: Thomas J. Guthrie, of Iowa.

For the four-year term: Carl B. Rix, of Wisconsin.

For the five-year term: Jacob M. Lashly, of Missouri.

These selections were voted and confirmed by the House.

Chairman Howard C. Spencer, of New York, submitted the report of the Section of Insurance Law, which was received.

Many Recommendations of Section on Taxation Are Adopted

After explaining the processes through which the Section developed its numerous recommendations, Chairman George Maurice Morris, of the District of Columbia, moved the adoption of the Section's Resolution No. 1, as follows:

1. SIMPLIFICATION OF RATE SCHEDULES FOR ESTATE TAX AND CREDITS FOR GIFT AND STATE INHERITANCE TAXES

Resolved, That the American Bar Association recommends to the Congress that the schedule of estate tax rates and the provisions for credit for gift taxes and credit for estate, succession, legacy and inheritance taxes paid the states be simplified;

Be Is Further Resolved, That the Association proposes that this result be achieved by amending section 810 to set forth a single schedule of rates and repealing section 935; by amending section 813 to make a single provision for credits for gift taxes, and repealing section 936(b); by amending section 813(b) to provide the credit for estate, succession, legacy and inheritance taxes paid to the states, and repealing section 936(a), all without any change in the amount of estate taxes or credits against such taxes; and

Be It Further Resolved, That the Section of Taxation is directed to urge the following proposed amendments, or their equivalent in purpose and effect, upon the proper committees of the Congress:

SECTION 810. *Rate of Tax.*

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed on the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the enactment of this title.

Upon net estates not in excess of $10,000, 2 per centum; $200 upon net estates of $10,000 and upon net estates in excess of $10,000 and not in excess of $20,000, 4 per centum in addition of such excess;

(continue schedule of rates exactly as now provided in section 935(b)).

SECTION 812. *Net Estate.*

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate—

(a) Exemption.—An exemption of $40,000; . . .

SECTION 813. *Credits against Tax.*

(a) Gift Tax.—(1) If a tax has been *paid under chapter 4 or under Title III of the Revenue Act of 1932, 47 Stat. 245, or* under section 319 of the Revenue Act of 1924, 43 Stat. 313, as amended by section 324 of the Revenue Act of 1926, 44 Stat. 86, on a gift, and thereafter upon the death of the donor any amount *in respect of such gift* is required to be included *in the value of* the gross estate of the decedent *for the purposes of chapter 3*, then there shall be credited against *the tax imposed by section 810 or 860 the* amount *of the* tax paid *under chapter 4 or under Title III of the Revenue Act of 1932, 47 Stat. 245, or under section 319 of the Revenue Act of 1924, 43 Stat. 313, as amended by section 324 of the Revenue Act of 1926, 44 Stat. 86,* with respect to *so much of the property which constituted the gift as is included in the gross estate, except that the amount of such credit shall not exceed an amount which bears the same ratio to the tax imposed by section 810 or 860 as the value (at the time of the gift or at the time of the death, whichever is lower) of so much of the property which constituted the gift as is included in the gross estate, bears to the value of the gross estate.*

(2) For the purpose of paragraph (1), the amount of tax paid for any year under chapter 4 or under Title III of the Revenue Act of 1932, 47 Stat. 245, or under section 319 of the Revenue Act of 1924, 43 Stat. 313, as amended by section 324 of the Revenue Act of 1926, 44 Stat. 86, with respect to any property shall be an amount which bears the same ratio to the total tax paid for such year as the value of such property bears to the total amount of net gifts (computed without deduction of the specific exemption) for such year.

(b) *Estate, succession, legacy and inheritance taxes.*—

(1) The tax imposed by section 810 or 860 shall be credited with the amount of any estate, inheritance, legacy or succession taxes actually paid to any State or Territory of the District of Columbia, or any possession of the United States, in respect of any property included in the gross estate (not including any such taxes paid with respect to the estate of a person other than the decedent).

(2) *The credit allowed by this subsection shall not exceed the following amounts:*

If the estate does not exceed $110,000, 8/10ths of 1% of the amount by which the net estate exceeds $60,000;

If the net estate exceeds $110,000 and does not exceed $160,000, $400 plus 1.6% in addition of the excess over $110,000;

If the net estate exceeds $160,000 and does not exceed $260,000, $1,200 plus 2.4% in addition of the excess over $160,000;

(continue this, using the brackets in the 1926 Act and 80% of the 1926 rates).

If the net estate exceeds $10,060,000, $1,068,400 plus 16% in addition of the excess over $10,060,000.

(3) The credit allowed by this subsection shall include only such taxes as were actually paid and credit therefor claimed within four years after the filing of the return required by section 821 or section 864, except that—

(A) If a petition for redetermination of a deficiency has been filed with the Board of Tax Appeals within the time prescribed in section 871, then within such four-year period or before the expiration of 60 days after the decision of the Board becomes final.

(B) If under section 822(a) (2) or section 871(h), an extension of time has been granted for payment of tax shown on the return or of a deficiency then within such four-year period or before the date of the expiration of the period of the extension.

Refund based on the credit made (despite the provisions of sections 910 to 912, inclusive), shall be made if claim therefor is filed within the period above provided. Any such refund shall be made without interest.

Sections 935, 936 and 937 should be repealed.

The above Resolution is designed to simplify the rate schedules of the federal estate tax by combining the present schedules of rates and by revising the provisions as to credits. The proposed amendments would make no change in the amount of tax due the United States nor would it make any change in the amount of the credit for state inheritance taxes.

For the House Committee on Section Reports, Harry Cole Bates, of New York, stated that the committee had heard the chairman of the Section, and recommended the adoption of this and ensuing resolutions from the Section. After an extended explanation by Chairman Morris, Ex-Governor Slaton inquired:

"As to the sum total of the recommendations, do they have the effect of lessening or increasing the tax, from the attitude that Congress has assumed with reference to that question?"

MR. GEORGE MAURICE MORRIS: "Governor Slaton's question is this: as to all of these recommendations, do they have the general effect of adding to or reducing the tax under the present statute? The answer to that is that some of them will have the effect of reducing the tax, some of them will have the

effect of increasing the tax, and some of them leave the tax unchanged."

MR. SLATON: "Then, Mr. Chairman, I would like to ask the gentleman when he comes to those sections which would have the effect of increasing the tax, would he be kind enough to tell us why you reported an increase."

Resolution No. 1 was thereupon put to a vote and carried. Chairman Morris moved and explained the Section's Resolution No. 2, which was as follows:

2. CREDIT FOR GIFT TAX AGAINST ESTATE TAX

Resolved, That the American Bar Association recommends to the Congress that the provisions of the Estate Tax Law allowing a credit for gift taxes paid on property required to be included in the gross estate be liberalized so as to remedy the injustice inherent in the present provisions; and

Be It Further Resolved, That the Association proposes that this result be achieved by the amendment of section 813 which will allow the taxpayer credit for any gift tax paid by him with respect to property required to be included in his gross estate and insure the government the same amount of total gift and estate tax as it would have received if the decedent had continued to own such property until his death; and

Be It Further Resolved, That the Section of Taxation is directed to urge the following proposed amendments, or their equivalent in purpose and effect, upon the proper committees of the Congress:

(a) Strike out section 813 (a).

(b) Reletter section 813 (b) as section 813 (a) and strike out the parenthetical clause reading "(after deducting from such tax the credits provided by section 813 (a) (2)."

(c) Enact as section 813 (b) the following:

I. "If a tax has been paid under chapter 4 or under Title III of the Revenue Act of 1932, 47 Stat. 245, or under section 319 of the Revenue Act of 1924, 43 Stat. 313, as amended by section 324 of the Revenue Act of 1926, 44 Stat. 86, upon any gift, and thereafter upon the death of the donor any amount in respect of such gift is required to be included in the value of the gross estate of the decedent for the purposes of subchapter A or subchapter B of chapter 3, the amount of the estate tax imposed by section 813 or 860 (after deducting from such tax the credit provided by section 813 (a)), and the additional estate tax imposed by section 935, shall be credited with an amount equal to the tax paid with respect to such gift."

II. "The taxes paid with respect to such gift shall be the excess of (a) the gift tax paid (whether before or after the death of the donor) upon all gifts made by the donor in his lifetime over (b) the gift tax which would have been payable upon the same gifts but excluding those gifts referred to in subsection I hereof."

The above Resolution recommends the broadening of the credit against the federal estate tax for gift taxes paid by the decedent during his lifetime involving the same property as is subjected to the estate tax. At the present time the Internal Revenue Code provides for a credit for gift taxes paid by the decedent during his lifetime. The limitations placed on this credit however are such as to result in the disallowance of a large part of the amount actually paid as a gift tax. The Resolution recommends that the credit be made equal to the full amount of gift taxes that resulted from the prior taxation of the transfer as a gift.

After some discussion between Mr. Morris, Mr. Seasongood, and Mr. Tappan Gregory, of Illinois, Resolution No. 2 was adopted by the House. Chairman Morris then offered his Resolution No. 3, as follows:

3. DEDUCTION FOR PROPERTY PREVIOUSLY SUBJECTED TO ESTATE TAX UNDER REVENUE ACT OF 1932 ONLY

Resolved, That the American Bar Association recommends to the Congress that the provisions of the Internal Revenue Code, allowing a deduction for property previously taxed in determining the gross estate, be amended to allow such a deduction where such property has been subjected to estate tax only under Title II of the Revenue Act of 1932, thus remedying an apparent mistake in the present statute; and

Be It Further Resolved, That the Association proposes that this result be achieved by an amendment of section 812(c), which will allow the deduction for property previously taxed, not only where the previous estate tax was paid under the Internal Revenue Code or under the Revenue Act of 1926 or some prior act, but also where the only estate tax paid on such property previously taxed was imposed by the Revenue Act of 1932; and

Be It Further Resolved, That the Section of Taxation is directed to urge the following proposed amendments, or their equivalent in purpose and effect, upon the proper committees of Congress:

(a) Amend the first part of the second sentence of section 812(c) of the Internal Revenue Code to read as follows:

This deduction shall be allowed only where a gift tax imposed under Chapter 4 or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this subchapter, *under Title II of the Revenue Act of 1932, 47 Stat. 243*, the Revenue Act of 1926, 44 Stat. 69, or any prior act of Congress, was finally determined and paid . . .

(b) That this amendment be made effective as if it had been enacted in the Internal Revenue Code on February 10, 1939, the date of the enactment of the Internal Revenue Code.

"The above resolution is designed to cover what apparently is a mistake in the provisions of law relating to the deduction allowed an estate for property which has been subjected to an estate tax within 5 years prior to the death of the decedent. At the present time it is understood that the Bureau of Internal Revenue is holding that the deduction for previously taxed property is not allowable where the only estate tax paid by the prior decedent was the additional estate tax imposed by the Revenue Act of 1932. In cases where the net estate before the deduction of the specific exemption is less than $100,000, but is more than $40,000, the only tax paid by the prior decedent would be the tax imposed by the Revenue Act of 1932. In such cases the Bureau disallows the deduction for previously taxed property, although allowing the deduction in other cases. The proposed amendment corrects this evident mistake in draftsmanship."

This was adopted by the House; and Chairman Morris moved and explained his Resolution No. 4, as follows:

4. INCOME OF DECEDENTS

Resolved, That the American Bar Association recommends to the Congress that section 42 of the Internal Revenue Code be amended to the end that undetermined income for personal services be not accrued for income tax purposes upon the death of an individual; and that the officers and council of the Section of Taxation be directed to urge the following proposed amendment, or its equivalent in purpose and effect, upon the proper committees of the Congress:

Sec. 42. *Period in Which Items of Gross Income Included*

The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period

in which falls the date of his death, amounts *(other than undetermined amounts for personal services)* accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period.

"The above Resolution," said Mr. Morris, "proposes a change in Section 42 of the Internal Revenue Code which, in its present form requires the inclusion in the last income tax return of a decedent of amounts of income 'accrued' up to the date of his death. This provision has been interpreted so as to expand the concept of accrual to include items which are unascertained and uncertain in amount and which the decedent's estate may never become entitled to receive. As a result large amounts of income are being taxed in the last return of a decedent at a time before the executors have received the money with which to pay the tax and before it is determined that the estate will ever receive the money. The situation is particularly aggravating in cases where the income of a decedent is income from professional personal services, such as attorneys' fees, doctors' fees, etc. The proposed Resolution recommends that undetermined amounts for personal services be excluded from the last return of a decedent."

This was adopted by the House; and Chairman Morris moved and explained his Resolution No. 5, as follows:

5. Jurisdiction of Board of Tax Appeals to Require a Clear Statement of the Grounds for a Deficiency in Taxes

Resolved, That the American Bar Association recommends to the Congress that the Internal Revenue Code be amended so as to empower the Board of Tax Appeals to require in proper cases pending before it that the Commissioner of Internal Revenue state clearly and completely the grounds upon which the deficiency is proposed; and that the officers and council of the Section of Taxation be directed to urge the following proposed amendment, or its equivalent in purpose and effect, upon the proper committees of the Congress:

That Section 111 of the Internal Revenue Code be amended by adding thereto the following sentence. "The Board may require, in any case pending before it, that the Commissioner state in writing clearly and completely the grounds upon which the deficiency is proposed."

The above resolution was stated by Mr. Morris to be "designed to fill an obvious gap in proper procedure before the United States Board of Tax Appeals. In some cases the Commissioner's notice of deficiency is not complete and the issues are not indicated by the petition and answer. The Board holds that it has no power to compel the Commissioner to state the basis for a deficiency. Such power should be conferred upon the Board by statute."

Chairman Morris' motion to adopt prevailed, and he offered and explained his Resolution No. 6, as follows:

6. Statute of Limitations Where Taxpayer Relies on Commissioner's Ruling and Files no Return

Resolved, That the American Bar Association recommends to the Congress that the Internal Revenue Code be amended so as to provide that where no return is filed by a taxpayer but the Treasury has ruled that no return need be filed, the statute of limitations shall run as though a return had been filed; and that the officers and council of the Section of Taxation be directed to urge the following proposed amendment, or its equivalent in purpose and effect, upon the proper committees of the Congress:

That Section 276 (a) of the Internal Revenue Code be amended by striking therefrom the period at the end thereof and inserting in lieu thereof the following:

"; provided, that if the failure to file a return is the result of a ruling by the Commissioner, the period of limitations provided in Section 275 shall apply as though a return had been filed in due form and time;"

"Under the present law," said Mr. Morris, "where a taxpayer files no return there is no period of limitations upon the assessment of additional taxes even though, in failing to file a return, the taxpayer relied upon rulings of the Commissioner of Internal Revenue. The above resolution proposes an amendment to the statute which would correct the obvious injustice of keeping the period of limitations open for an indefinite period where the taxpayer has thus relied upon a ruling of the Commissioner."

This was adopted by the House; and Chairman Morris presented and explained his Resolution No. 7, as follows:

7. Change in Procedure for Certification of National Defense Facilities and Contracts for Amortization Purposes

Resolved, That the American Bar Association recommends to the Congress that H. J. Res. 235, amending Section 124 of the Internal Revenue Code by extending the time for application, and changing the procedure, for certification of national defense facilities and contracts for amortization purposes, be enacted by the Congress; and that the officers and council of the Section of Taxation be directed to urge upon the proper committees of the Congress the adoption of this legislation.

H. J. Res. 235 was stated by Mr. Morris to provide as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That section 124(f)(1) of the Internal Revenue Code, as amended, is amended to read as follows:

(1) There shall be included only so much of the amount otherwise constituting such adjusted basis as is properly attributable to such construction, reconstruction, erection, installation, or acquisition after June 10, 1940, as either the Secretary of War or the Secretary of the Navy has certified as necessary in the interest of national defense during the emergency period, which certification shall be under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy and subject to such policies and procedures as may be prescribed from time to time by the President, or by such agency or officer as he may designate.

Section 2. Section 124 (f)(3) of the Internal Revenue Code, as amended, is amended by striking out "sixty days" and inserting in lieu thereof "six months."

Section 3. Section 124(i) of the Internal Revenue Code, as amended, is amended to read as follows:

PROTECTION OF THE UNITED STATES.—If the taxpayer has been or will be reimbursed by the United States for all or a part of the cost of any emergency facility pursuant to any contract (in excess of $15,000 in amount) with the United States, made on its behalf by the War Department, the Navy Department, the United States Maritime Commission, or such other department or agency as the President may designate, either—

(1) directly, by a provision therein dealing expressly with such reimbursement, or

(2) indirectly, because the price paid by the United States (insofar as return of cost of the facility is used by the United States as a factor in the fixing of such price) is recognized by the contract

as including a return of cost greater than the normal exhaustion, wear, and tear: Provided, That no such greater return of cost shall be deemed to have been used as a factor in the fixing of such price when the negotiating or contracting officer reports that after careful consideration he is satisfied that such greater return was not included in the price, no amortization deduction with respect to such emergency facility shall be allowed for any month after the end of the month in which such contract is made unless either the Secretary of War or the Secretary of the Navy certifies to the Commissioner that the interest of the United States is adequately protected with reference to the future use and disposition of such emergency facility. A certificate of like effect may also be issued with respect to emergency facilities for which the taxpayer has not been or will not be so reimbursed. A certificate by either the Secretary of War or the Secretary of the Navy made to the Commissioner, to the effect that under any such contract, reimbursement for all or a part of the cost of any emergency facility is not provided for within the meaning of clause (1) or clause (2), shall be conclusive for the purposes of this subsection. Except in cases of applications therefor filed before February 6, 1941, the certificates provided for under this subsection shall have no effect unless an application therefor is filed either before the expiration of six months after making of such contract or before the expiration of sixty days after the making of a certificate under subsection (f), whichever is later.

The reports of negotiating and contracting officers and the certificates provided for in this subsection shall be issued under such regulations as may be prescribed from time to time by the Secretary of War and the Secretary of the Navy which regulations shall be subject to such policies and procedures as may be prescribed from time to time by the President, or by such agency or officer as he may designate.

The terms and conditions of contracts with reference to reimbursement of the cost of emergency facilities and the protecting of the United States with reference to the future use and disposition of such emergency facilities shall be made available to the public.

SECTION 4. The amendments made by this joint resolution to section 124 of the Internal Revenue Code shall be applicable as if they were a part of such section on the date of the enactment of the Second Revenue Act of 1940.

The above resolution corrects a number of flaws in the present provisions of the law. It is understood that the Resolution has been agreed upon by interested parties and by representatives of the government as being the most practicable way of meeting some of the legal problems that face business men in connection with construction of defense facilities.

This resolution, too, was passed by the House; and Chairman Morris moved and explained his Resolution No. 8, as follows:

8. REPEAL OF DECLARED VALUE EXCESS PROFITS TAX

Resolved, That the American Bar Association recommends to the Congress that the declared value excess profits tax now in effect (secs. 600-604, I.R.C.) should be repealed, together with the capital stock tax (secs. 1200-1207); and that failing such action as to the said two taxes, the Internal Revenue Code be so amended that every year shall be a "declaration year."

The following would be an appropriate way of accomplishing such amendment:

Paragraph (f) of section 2100, Internal Revenue Code, is amended to read as follows:

"(f) Declaration Years After June 30, 1940. In the case of any domestic or foreign corporation, the year ending June 30, 1941, and each succeeding year ending on June 30, shall constitute a declaration year."

The Section of Taxation is directed to urge upon Congress legislation consistent with the foregoing.

The present declared value excess profits tax requires a taxpayer corporation to make a guess as to what its annual earnings will be during three-year periods, and unless it declares a capital stock tax value ten times as high as expected earnings, it is subjected to the "declared value excess profits tax" in addition to the recently enacted excess profits tax. It is difficult for many businesses to anticipate their income for three years ahead and the tax operates as a penalty on those corporations. It is recommended that the tax be repealed or that an annual declaration of value be allowed.

Resolution No. 8 having been adopted by the House, Chairman Morris moved and explained his Resolution No. 9, as follows:

9. RETROACTIVE CHANGES IN THE TAX LAW

Resolved, That the American Bar Association recommends to the Congress that when circumstances compel an increase in the tax burden imposed on *already earned* income—for instance, by provisions retroactive to the beginning of the year of the tax enactment—retroactive action for such purposes should be limited to increases in the rates; changes in the basic pattern of the tax should apply prospectively only.

This resolution was stated by Mr. Morris to "condemn retroactive changes in the basic pattern of our tax laws because of the obvious unfairness of retroactive changes in principles upon which a tax is levied and the resulting dislocation and danger to business."

This was adopted by the House; and Chairman Morris moved and explained his Resolution No. 10, as follows:

10. REPEAL OF SECTION 734 OF THE INTERNAL REVENUE CODE.

Resolved, That the American Bar Association recommends to the Congress that Section 734, Internal Revenue Code dealing with adjustment in case of position inconsistent with prior income tax liability, be repealed, and that the Section of Taxation be directed to urge such repeal upon the proper committees of the Congress.

This resolution was stated by Mr. Morris to "recommend the repeal of a provision which violates the principle of repose under the existing provision return may be made to as long ago as 1913 to add to the current excess profits tax if the present treatment is inconsistent with that accorded in earlier years. A theoretical consistency has been sought which may increase or decrease present taxes without regard to the practical value of the statute of repose for both the taxpayer and the government."

Resolution No. 10 having been put to a vote and carried by the House, Chairman Morris moved his Resolution No. 11, which was as follows:

11. AMENDMENT TO SECTION 742 OF THE INTERNAL REVENUE CODE

Resolved, That the American Bar Association recommends to the Congress that Section 742, Internal Revenue Code (which relates to the base period net income of "acquiring corporations" as defined in Section 740), be amended so as to extend the application of the so-called "growth" principle of computing base period income (set out in Section 713(f)) to the case of corporations electing or required to use Section 742, and that the officers and Council of the Section of Taxation be directed to urge the following proposed amendment, or its equivalent in purpose and effect, upon the proper committees of the Congress:

Section 742 of the Internal Revenue

Code is hereby amended by adding the following at the end thereof:

"(h) In the case of a taxpayer as to which the aggregate, for the second half of the base period, of the plus amounts less the aggregate of the minus amounts, ascertained under subsection (a)(3) of this section, exceeds the aggregate so determined for the first half of the base period, the average base period net income shall be determined in accordance with the method and principles of section 713(f)."

This was stated by Chairman Morris to be "a recommendation which would extend to acquiring corporations under one section of the statute an avoidance of undue hardship which avoidance was accorded to corporations under another section. The recommendation is intended merely to apply the so-called 'growth' principle to the more involved situation (Sec. 742) as well as to the simpler one (Sec. 713(f))."

When this had been adopted by the House, Chairman Morris moved and explained his Resolution No. 12, which was the last from his Section, as follows:

12. CARRY-OVER OF EXCESS PROFITS TAX CREDIT

Resolved, That the American Bar Association recommends to the Congress that the provisions as to carrying over the unused excess profits credit for years beginning in 1940 be restored as such provisions were prior to the recently enacted Revenue Act of 1941 and that, to this end, Section 202(e) of that Act (adding to Section 710(c)(1) of the Internal Revenue Code the following sentence, "For such purpose the excess profits credit and the excess profits net income for any taxable year beginning in 1940 shall be computed under the law applicable to taxable years beginning in 1941.") be repealed; and that the Section of Taxation be directed to urge such repeal on the proper committees of Congress.

Mr. Morris stated that the Act of 1940 "provided that a corporation which had a larger excess profits credit than it could use be permitted to carry over that credit to the next year and even a succeeding year. The new Revenue Act would deny to a substantial extent that carry-over. This destroys an expectancy upon which many taxpayers have relied. The resolution for repeal would remedy this."

When this had been adopted by the House, Mr. Seasongood, of Ohio, asked endorsement for a bill allowing the expenses of collecting income to be deducted from income. Chairman Morris reminded that this had been acted on by the House in Philadelphia, but that the bill had been held in abeyance while revenue measures were under consideration.

Section of Municipal Law Reports

In the absence of Corporation Counsel William C. Chanler, of New York, Chairman of the Section of Municipal Law, who had been obliged to leave Indianapolis, its report was presented by Mr. Seasongood, of Ohio. For the Section, the following resolution was offered and its adoption moved:

Resolved, That the municipal debt readjustment provisions of the Federal Bankruptcy Act should not be allowed to expire June 30, 1942, and that the Municipal Law Section is authorized to represent the Association at congressional hearings if legislation deferring that date of expiration is introduced in the Congress of the United States.

The resolution was put to a vote and carried.

Section of Real Property Law Reports

The report of the Section of Real Property, Probate and Trust Law was next presented, by Harold L. Reeve, its Chairman. The following resolution from the Section was offered by Chairman Reeve and approved and adopted by the House:

The Section of Real Property, Probate and Trust Law recommends to the House of Delegates that there be referred to the National Conference of Commissioners on Uniform State Laws the following papers which were presented to the Section at its meeting at Indianapolis on Tuesday, September 30, 1941:

(a) Desirability of statutory recognition of doctrine of cy-pres in construing charitable trusts;

(b) Perpetuity, rule against perpetuity, codification of both;

(c) Abolishing possibilities of reverter after lapse of time;

and that the Conference be requested to consider the desirability of preparing drafts of uniform laws to embody the suggestions contained in the papers.

Section of Commercial Law Reports

The next report was by the Section of Commercial Law, given by John M. Niehaus, Jr., of Illinois, the Section Chairman. After reviewing the work of the Section, Chairman Niehaus referred to its "major objective of this year," which came about through the resolution passed by the House of Delegates at its meeting on March 18, 1941. "At that time," said Chairman Niehaus, "there was anticipated a bill which is now known as H.R. 4394, a bill planned to revamp completely the administration of bankruptcy law in this country. It was then in draft form and seemed likely to be filed in Congress at any time."

After chronicling the activities of the Section and the aroused interest in the bill, Chairman Niehaus stated that, "through the generous cooperation of Judge Sumners, Chairman of the Judiciary Committee, all final action with reference to this bill was postponed by the Judiciary Committee until after this meeting of the American Bar Association. There has been action taken already by seven state bar associations, one approving the bill in its present form, and six other state bar associations offering suggestions either to further study or deliberate recommendations with reference to change in form and amendment."

Debate as to Revision of the Bankruptcy Act

The final wording of the resolution recommended by the Section and approved only as to form by the House committee, was stated by Chairman Niehaus to be as follows, which he offered and moved:

Resolved, That the American Bar Association oppose the passage of H.R. 4394 in its present form and that the Section of Commercial Law continue to confer with the Attorney General's Committee on Bankruptcy Administration, for the purpose of making suggestions for a redraft of the bill.

Mr. Willy, of South Dakota, made the following statement for the House committee on Section Reports: "There are some highly controversial matters involved in connection with this resolution. Your committee reports on this resolution only as to its form. The committee approves the form of the resolution and submits it to the House without recommendation."

The substance of the recommenda-

tion of the Board of Governors with regard to the report was stated to be, "First, that instead of referring the matter to the Section of Commercial Law, the President be authorized to appoint or designate a committee to confer with the Attorney General's Committee in making suggestions for a proposed redraft of the bill; and, second, upon condition that the action of the committee in so doing should not be binding upon the Association until a definitive bill as redrafted should be submitted to the House of Delegates or to the Board of Governors if the matter came up before the House of Delegates met next."

Chairman Gay of the House confirmed the statement of the recommendation of the Board of Governors, and Mr. Maguire, of Oregon, moved to substitute the Board's recommendation in place of the Section's resolution. David A Simmons, of Texas, urged that the Section be not superseded by a special committee in such a matter. Chairman Niehaus also argued earnestly against Mr. Maguire's motion. The following then took place:

MR. MAGUIRE: "May I make an inquiry of the speaker before he leaves? Would the Section of Commercial Law have any objection to including in its resolution the clause that their cooperation with the Attorney General's Committee should not be binding upon the Association until such time as the definitive bill, as redrafted, was submitted to the House of Delegates for its approval?"

MR. NIEHAUS: "I think that that would be a logical conclusion. I am sure that that was our idea."

MR. MAGUIRE: "If you will so amend your resolution, I will be glad to withdraw the substitute."

MR. NIEHAUS: "I am quite willing to accept that amendment, sir."

MR. SIMMONS: "My whole understanding is that this Section is not to prepare and bring here a definitive bill referred to by Mr. Maguire, but to fight objectionable provisions in a bill introduced by other interests in the Congress of the United States."

MR. NIEHAUS: "That is correct, Mr. Simmons."

CHAIRMAN GAY: "Mr. Maguire withdrew his substitute motion and his second consented to the withdrawal of it. The question is upon the resolution offered by the Chairman of the Section as amended."

The amended Section resolution was then put to a vote and was adopted amid applause.

President Lashly Speaks as to Work of Judge Thacher's Committee

President Lashly was then recognized to speak regarding a report which had not been presented orally before the House. "There is here a report," said he, "submitted by the Special Committee on Advancement and Coordination of the work of the Association in National Defense, which has been mimeographed, and I think earlier in the week left on the tables, as to which no report was made orally, which some of the gentlemen of the committee and others have asked me to call to your very special attention. In the interest of the new administration which is to get into harness this afternoon, I feel I should like to have a little personal talk with the members of the House about it.

"In May at the time of the meeting of the Board of Governors and the American Law Institute in Washington, the then Attorney General, Mr. Jackson, made a speech at the American Judicature Society meeting in which he called the attention of the bar to the fact that there were a number of very serious problems in the Department of Justice with which it had to deal in this emergency which the nation is confronting, and that these problems were of such a nature that the Department of Justice had very real need of some outside persons to counsel with, to sit down with and study the public reactions to and the propriety of measures that they were contemplating with which they hoped to deal with some of the ticklish and difficult and delicate problems which were coming up.

"One of them was represented in the Hobbs Bill, then pending at the time of his speech, dealing with the subject of deportable aliens. Another had to do with the subject of evidence by wire-tapping which presently came before the House of Representatives, and the bill was defeated there before this House or any agency of the Association dealt with it.

"There were a number of other matters that had not gone that far, which arose constantly and continuously because of the confused and changing scene brought about by shifting foreign relations and domestic situations indirectly more often resulting therefrom, as to which the Department wanted us to set up some agency (it resolved itself into that presently) so that we could confer with the Department of Justice about these delicate and difficult matters.

"At the authorization of the Board of Governors, your President appointed a committee then, within the week, of which former Solicitor General and Judge Thomas D. Thacher, of New York, was named as Chairman. There was appointed also on the committee, former Attorney General William D. Mitchell, of New York, and Grenville Clark, the former Chairman of our Committee on the Bill of Rights.

"The other persons appointed on the committee were representative of a department of work of the Association. Mr. Armstrong, the Chairman of the Committee on Jurisprudence and Law Reform; Mr. Simmons, the President of the American Judicature Society; Mr. Wickser, representing the Board of Governors; Mr. Beckwith, the Chairman of the Special Committee on National Defense; Mr. George I. Haight, the Chairman of the Special Committee on Bill of Rights of the Association, made up the composite committee representing those various interests, and the committee went to Washington and sat down with the Attorney General and his assistants and conferred about a great many problems that were

arising, and has done so from time to time. The committee studied the pending Hobbs Bill and got out a report which was submitted to the Board of Governors.

"It was the suggestion of your President that the committee's approach to the wire-tapping bill, for example, should be cautious, and it was so. It was proposed that, if the committee should study and reach conclusions in reference to the wire-tapping bill, their conclusions and discussions and all of the reasons and considerations in relation to it, should be mailed to each member of the House of Delegates for his separate study and consideration, and that no expression of the Association's opinion on a bill of that sort or type, covering a subject of that delicacy, should be given until the returns from which the opinions of the House of Delegates could be obtained and gathered together and digested, were received. Before it got to that point, the bill was defeated in the House of Representatives, and it is not now a pending issue.

"There are a number of close and delicate situations that the Department of Justice cannot very well deal with out on top of the table, as they are in various stages of immaturity because of public impressions and reactions before the policy has been determined upon as to which the committee has been consulting and advising, and I am sure has been performing a constructive service for the country. The character of the men and the representative capacities which they hold, I think, will be an earnest assurance to the gentlemen of this House that the whole procedure is being done conservatively, but courageously and constructively.

"I am sure that you would want to know that this is being done, and that this little closer relationship and affiliation between the professional organization which we represent, and the Government through its Department of Justice in dealing with problems of great delicacy and importance in these critical times, growing ever more critical as we face the future, does exist. I am sure you would want to know that the Association is coming closer to the Government and rendering a running service at this point which I believe we might all take pride in. It is new, it is something experimental in the life of the Association, and to me it has been a source of great gratification that we have been called upon and elected, and that we have been able to furnish the machinery to render this type of public service.

"I wanted you to know about that. I thank you."

CHAIRMAN GAY: "Thank you, Mr. President. I am sure the House was gratified to have that informative report on the work of the Committee on Advancement and Coordination of National Defense."

Statement by the Budget Committee

Philip J. Wickser, of New York, incoming Chairman of the Budget Committee, was recognized. "I want to make a short statement to acquaint you with the main outlines of the financial situation of your Association," said Mr. Wickser.

"I am glad to tell you that the figures and expenses for the year proposed July 1st last, our fiscal year, which carries over all expenses of committees and Sections in work which terminates with the annual meeting, dates back to the first of July and balances our books as of the close of the year. Those books are in balance, and we are in the black.

"We have had another year in which we have lived within our income, in which we have put a little something aside to add to our surplus. That was done in the face of unexpected demands for setting up and financing the important emergency work of the National Defense Committee, and in the face of demands which could not have been measured a year ago of the financing and making effective of the most important work which Judge Parker's Committee on Improving the Administration of Justice is performing.

"I suppose if we added in the form of receipts the fair value of the work of such men as I have mentioned and many others in this Association, our income sheet would show that we have received far in excess of the actual dollar entries which we have made.

"A year ago we budgeted an anticipated income of $242,000, and we budgeted estimated expenses of your Associational money, and distinguished it from revenues, from dues and other sources to Sections and committees, of $240,000, so we had a $2,000 paper margin. Our estimate of the dues to be received came out within a few dollars. We received about $219,000 from our members from regular dues, which is about what we budgeted. The JOURNAL's advertising went up and is still on the rise, to $18,000. We had some money from our investments, and that was the way our budget looked a year ago.

"The two items I have mentioned amounted to $15,000, and there were additional calls for work of the Thacher Committee and for other work which had to be supplemented in the revenues originally granted, so we finally ended up by budgeting $264,000, which would certainly have put us in the red, in spite of the fact that we had $12,000 from the contributing memberships which we knew nothing about a year ago.

"But through economies effected in operation, through care exercised at Headquarters, and through the careful work of the committees, we were able to effect economies against the appropriations, which give us a black entry for the year of between $8,000 and $10,000.

"Your Headquarters Staff has run against the line budget, and it has run carefully, and it threw off a black entry of approximately $6,800. I have still to hear from the committees, but I feel confident that there is a thousand or two there.

"For the coming year, we again have budgeted within two thousand dollars of our anticipated income, and we have allowed for a shrinkage

in membership due to increasing numbers of our members who may be drafted, and due to economic conditions which, while improving in some parts of the country from the point of view of voluntary associations, are still declining in other parts of the country, where the burden of payment is becoming more difficult for some lawyers to sustain.

"We have budgeted this year, and our budget is prepared and in balance; but it is only accomplished by cutting most of our appropriations for things like our annual meeting and our fixed charges, to the bone. I think we will get through, and get through all right with your help, if we do not get overtaken by inflation or something else which blows the ceiling off. If we can have your help, and if we can have an increase in membership, and if the contributing memberships as authorized by your recent amendment to the By-laws is on a basis of $25.00 instead of $33.00 over-all—if that can be kept rolling by the extension of the good will and good repute of this Association in your localities, the money will come in.

"I want to say in behalf of the Budget Committee that there is no disposition to cut the worthy work of any Section. The plain truth is that in order to have any kind of organization, you first must have executives and boards which can function in this House. You then must have an annual publication and a properly set up Headquarters for administrative purposes.

"What you have got left is available for the life work of the Association. It amounts to between $50,000 and $60,000 a year only of our money, and it should amount to at least three times that. But the fact is that every dollar from a new member which comes in, bears only a relatively small proportion of the fixed overhead. Most of it is clear gain for the further prosecution of the work which we have been doing, and for which you have assembled this week to consider." (Applause.)

W. Roy Vallance, Secretary-General of the Inter-American Bar Association, then made a statement as to the Havana Conference of that organization, and as to the plans for the second conference, to be held in Buenos Aires in 1942.

Arthur H. Lewis, of Oregon, arose to say that the Oregon State Bar hopes to have the 1943 meeting of the American Bar Association held in Portland, Oregon. He briefly extended a most cordial invitation.

Plans for a Mid-Winter Meeting of the House Adopted

Chairman Chauncey E. Wheeler reported that the Committee on Rules and Calendar unanimously favors the holding of a mid-winter meeting of the House. He offered the following resolution, along the lines adopted in previous years:

> *Resolved*, (1) That the House hold a mid-year meeting at such time and place as shall be determined by the Board of Governors and upon not less than sixty days' notice, as prescribed by the Rules of Procedure of the House of Delegates.
>
> (2) That the Board of Governors be requested to fix the place designated for such meeting of the House as the place also for the meeting of the State Delegates for the purpose of nominating officers and members of the Board of Governors, and to fix the time of the meeting of the State Delegates so that it will immediately follow or precede or be held in conjunction with the meeting of the House.
>
> (3) That all Sections and Committees which intend to hold an interim meeting and which have appropriations therefor be requested to hold these interim meetings in conjunction with such meeting of this House, if possible.
>
> (4) That members of this House who are not entitled to reimbursement for their expenses from some other appropriation or association be reimbursed for any actual expenses necessarily incurred by railroad and Pullman fares for attendance at such meetings.

The resolution was adopted by the House.

Resolution as to Hospitality Extended in Indianapolis

Chairman Wheeler, for the Committee on Rules and Calendar, offered in the House the resolution, passed also by the Assembly, as to the generous hospitality which the Association, its members, and guests, have received in Indianapolis and Indiana. The resolution was adopted amid hearty cheers. Its text was published in full in the account of the Assembly proceedings, in the November JOURNAL.

Mr. Morris arose to make a motion, and the following took place:

MR. MORRIS: "Before making that motion, I should like to lay out some adjectives and I will read them to you: able, alert, diligent, efficient, painstaking, judicious, and fair, conscientious, hard-working, respected, admired, and highly appreciated.

"If I had not been informed by the Chairman of the Rules and Calendar Committee that the motion was out of order, I at this point would move that all members of the House of Delegates rise and accord by applause to Thomas Benjamin Gay their assent to those adjectives as applied to him as Chairman of this House.

". . . The audience arose and applauded as Chairman Gay called them to order . . ."

CHAIRMAN GAY: "Thank you, gentlemen."

Resolutions Offered from the Floor Are Acted On

Chairman John Kirkland Clark, of the Committee on Draft, reported on the resolutions referred to it. The first one by Mr. Seasongood, of Ohio, was approved as to form, with a couple of verbal changes, and read as follows:

> At the first meeting of the House of Delegates following the retirement of Chief Justice of the United States Charles E. Hughes, this House expresses its profound admiration for the public services rendered by him in the administration of justice and otherwise and its sincere wishes for many more years of fruitful effort for the public good.

The resolution was put to a vote of the House, and was adopted with manifest approbation. Chairman Clark reported Mr. Seasongood's second resolution, also slightly changed in verbiage:

> *Resolved*, That there be and hereby is created a special committee of the American Bar Association on civil service. The committee shall study the laws governing the civil service of the nation, the states and the sub-divisions thereof and make recommendations for the improvement of the administration.

Opposition to a Committee on Civil Service

Chairman Gay referred to, and Secretary Knight read, a letter received from Corporation Counsel William C. Chanler, Chairman of the Section of Municipal Law, who had been obliged to return to New York. In opposition to Mr. Seasongood's motion, Mr. Chanler wrote, in part:

> The Section of Municipal Law has for some time had a committee on civil service, of which Mr. Seasongood has been chairman. That committee reported a resolution which was approved by the Section Council and by the House of Delegates at the annual meeting in Philadelphia a year ago.
>
> Mr. Seasongood now wishes to have a separate and independent Committee or Section on civil service appointed directly by the Bar Association.
>
> It seems to me unfortunate to create a new Section or Committee of this kind. Matters relating to civil service are of particular interest to persons concerned with problems of municipal law. One of the great difficulties at American Bar conventions arises out of the number of separate committees that are continuously in session. It is impossible for people interested in various subjects to attend all meetings at once. The proposed new committee would simply mean that lawyers interested in municipal law, who have, as I have stated, a peculiar interest in matters relating to civil service, might find it impossible to attend meetings of the new Civil Service Committee. I see no reason why the existing arrangement whereby civil service matters are discussed by a committee of the Section of Municipal Law should be disturbed.
>
> I do not think the suggestion that civil service goes beyond the confines of municipal government is of sufficient importance to create a new subdivision of this kind.
>
> Furthermore, I might point out that most matters discussed by the committee of civil service are questions of public policy rather than questions of law. Whether or not government employees should be selected through civil service is not in the first instance a legal question.

Mr. Seasongood's motion was voted on by the House and defeated. When he asked a reconsideration and an opportunity to speak for his motion, E. Paul Mason, of Maryland, moved to reconsider. This was put to a vote and was defeated.

Resolution as to Observing the 150th Anniversary of the Bill of Rights

For the Committee on Draft, Chairman Clark reported that a resolution had been offered by a member of the House, as a result of a letter received from the Director of Relations of the Citizenship Educational Service, Inc., which was referred to in the resolution as submitted.

"It was the unanimous opinion of the Committee on Draft," declared Mr. Clark, "that while the spirit which led to the presentation of the proposed resolution was admirable and commendable, it was unwise for the House to adopt a resolution in such form, mentioning cooperation to an outside organization. Normally, of course, such a resolution would have been presented in the Assembly at its first session and would have come up for consideration by the proper committee of the Assembly.

"Inasmuch, however, as the celebration of the one hundred and fiftieth anniversary of the Bill of Rights has been brought to our attention in this manner, and there was a feeling by the Committee on Draft that it might be a proper subject for a resolution (although one member dissents and most of the committee were in some doubt as to the advisability), we have undertaken to make a draft which we submit to the House in the following words:

> *Whereas*, The year 1941 marks the one hundred and fiftieth anniversary of the ratification of the Bill of Rights, contained in the first ten amendments to the Constitution of the United States; and
>
> *Whereas*, Eternal vigilance in the cause of human liberty requires a constant rededication to those basic concepts that constitute the important contributions of the American people to the cause of free government, now therefore be it
>
> *Resolved*, By the House of Delegates of the American Bar Association that this Association does hereby approve an appropriate national observance of the one hundred and fiftieth anniversary of the ratification of the Federal Bill of Rights, to the end that there may be stimulated and maintained a national consciousness of the truth of the proposition that liberty is not only a heritage but a fresh conquest for each generation."

Chairman Clark moved the adoption of this resolution, and it was adopted by the House.

Chairman Harry P. Lawther stated that the Committee on Hearings had held no hearings, had received no requests for hearings, and had no report.

Chairman Morris B. Mitchell reported on further changes in the certifications of Delegates to the House. His supplemental report was approved.

Concluding Exercises in the House

Unfinished business having been disposed of, Chairman Thomas B. Gay, who had served for three years as Chairman of the House, spoke briefly and feelingly as follows:

"Before turning the gavel over to the President, which the calendar provides that I shall do at this time, I wish to make a brief personal statement to the members of the House in view of the wholly unauthorized but very deeply appreciated action which it has just taken in respect to myself.

"Although my constituency have honored me by continuing me among you as a State Delegate from Virginia, my term of service as your Chairman concludes with the adjournment of this meeting.

"The office is a distinction to any man, and I shall always look upon my tenure in it as one of the notable and memorable achievements of my life. In addition to enabling me to make many new and cement many old friendships, it has enabled me to have a deeper and a much broader appreciation of the great potentialities of this Association for service to our profession and to the public, and I wish to express to the membership of the House my very heartfelt appreciation of the uniform courtesy and consideration which has been shown me as your presiding officer. (Applause.)

"In saying au revoir but not goodbye, may I bespeak for Judge Crump, whom you will shortly elect as my successor, that same degree of helpful cooperation and consideration which you have always so generously accorded me.

"I thank you!" (Applause.)

Association Officers are Elected by the House

With President Lashly again in the

chair, Secretary Knight presented the following certificate:

"In accordance with the provisions of Rule 11 of the Rules of Procedure, the Chairman of the House, together with the Secretary, certifies that on Tuesday, March 18, at a meeting of the State Delegates in Chicago at which forty-three were present, the following persons were nominated for the following named offices:

For President, Walter P. Armstrong
For Chairman of the House of Delegates, Guy Richards Crump
For Treasurer, John H. Voorhees
For Secretary, Harry S. Knight

David A. Simmons, of Texas, moved that the officers be elected as nominated, and that the Assistant Secretary cast the unanimous ballot of the House for the election of the officers whose names had just been read. The motion was seconded, put to a vote, and carried unanimously. Assistant Secretary Stecher cast the ballot, and announced that he had done so.

President Lashly introduced to the House its new Chairman, Judge Guy R. Crump, of California, who said:

"I deeply appreciate the honor which this House has conferred upon me and at the same time, I believe that I realize the concomitant obligations. I feel that I am in a difficult position, following chairmen like George Maurice Morris and Thomas Benjamin Gay. You will have to be patient with me and help me. I thank you, Mr. Gay, for bespeaking that assistance in my behalf." (Applause.)

On motion of Judge Lawther, the fourth and final session of the House, at the 1941 Annual Meeting, adjourned at 12:30 o'clock.

President Armstrong Speaks to the Bar

SINCE the Indianapolis convention, at which Hon. Walter P. Armstrong was inducted as President, he has been invited to make a number of important addresses at leading State Bar Associations.

On October 11, he made the principal address at the annual banquet of the Missouri State Bar Association. On October 18, he spoke on "Law Reviews and Law Reviewers" at a dinner given to the Board of Editors of the Tennessee Law Review and to the Supreme Court of Tennessee at Knoxville. On October 23, he spoke before the Connecticut State Bar Association at Hartford on "Fifty Years After", paying tribute, among other things, to Honorable Simeon E. Baldwin, who was largely instrumental in organizing the American Bar Association and who himself was a later President of the Association. Mr. Armstrong, incidentally, was a student under Judge Baldwin when that leading figure in American law was teaching at Yale Law School. On October 23, Mr. Armstrong spoke on "Teamwork" before the Ohio State Bar Association at Toledo. On October 31, Mr. Armstrong made two addresses before the Oklahoma State Bar Association, speaking on "The Challenge We Face" and "Lawyers Face the Future".

Committee on Rules and Calendar to Meet

THE Rules and Calendar Committee of the House of Delegates will meet at the Bar Association of the City of New York on Dec. 5 and 6, 1941, for the purpose of considering proposed changes in the Constitution of the Association relating to the nomination and election of officers. All members interested in being heard are invited to be present or to submit their views in writing prior to the date of the meeting to Thomas B. Gay, Chairman, Electric Building, Richmond, Virginia.

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1941-1942

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NEW CLASS OF SUSTAINING MEMBERSHIPS

AT the Indianapolis meeting, by amendment to the By-Laws, all existing references to sustaining memberships were repealed and a new class of membership was created whereby any present member of the Association, or anyone eligible for membership, may become a sustaining member by agreeing to pay until further notice $25 per annum in lieu of present $8 dues.

Those who paid the $25 last year in addition to regular dues are considered to be in good standing as sustaining members until July 1, 1942, but their present commitments end at that time in accordance with the cards which they signed.

In order to have all sustaining memberships date from July first and coincide with the fiscal year of the Association, present members who become sustaining members before January 1, 1942, will pay only $12.75 in addition to the regular dues already paid, and beginning July 1, 1942, they will pay $25 each year in place of their present $8 regular dues. This will continue until such person notifies the Chicago office of the Association that he wishes to revert to the regular $8 membership.

Heretofore sustaining memberships have been on a temporary, emergency basis. During the past Association year more than $21,000 has been raised in this way, and the funds so received were instrumental in balancing the budget in the face of extraordinary expenditures, including national defense. In creating sustaining memberships as a regular class, the Association has recognized that the regular $8 dues do not create sufficient funds to finance its manifold activities and that there are many members of the profession who are willing and able to pay $25 annually in support of what the Association is doing. This will remove the necessity for emergency campaigns.

All present members of the Association, other than those who signed the one-year sustaining membership card last year are invited to become permanent sustaining members by signing and returning to the Association Headquarters the following:

SUSTAINING MEMBERSHIP

American Bar Association
1140 North Dearborn St.
Chicago, Illinois.

The undersigned member of the American Bar Association hereby elects to become a Sustaining Member and agrees to pay $25 each fiscal year beginning July 1, 1942, in lieu of regular $8 dues, until further notice to the Association.

In payment of pro-rated Sustaining Membership dues to July 1, 1942, in addition to regular dues heretofore paid, check for $12.75 is enclosed.

Name_____

Street_____

Dated____, 1941 City and State_____

CONFERENCE OF SECTION CHAIRMEN IN CHICAGO

By JOSEPH D. STECHER
Assistant Secretary

THE conference of Section Chairmen of the Association which, under the resolution adopted by the House of Delegates in 1940, is to be held as soon as feasible following the annual meeting, convened at Chicago on October 25th. Those present included, President, Walter P. Armstrong, Treasurer, John H. Voorhees, Secretary, Harry S. Knight, Executive Secretary, Olive G. Ricker, Assistant Secretary, Joseph D. Stecher, Carl V. Essery, Chairman of the Sub-Committee of the Board of Governors on Sections, Robert F. Maguire and Floyd E. Thompson, members of the Sub-Committee on Sections, and the following Section Chairmen: L. Stanley Ford, Bar Organization Activities; John M. Niehaus, Jr., Commercial Law; James J. Robinson, Criminal Law; Clement F. Robinson, Insurance Law; David E. Grant, International and Comparative Law; Philip H. Lewis, Junior Bar Conference; Charles W. Racine, Legal Education and Admissions to the Bar; James T. Finlen, Jr., Mineral Law; Barnet Hodes, Municipal Law; Roy C. Hackley, Jr., Patent, Trademark and Copyright Law; Robert E. Healy, Public Utility Law; Harold L. Reeve, Real Property, Probate and Trust Law; and George M. Morris, Taxation. W. Leslie Miller, Vice-Chairman of the Section of Commercial Law and James P. Economos, Secretary of the Junior Bar Conference, also attended the conference.

In opening the discussion President Armstrong directed attention to the proceedings of the 1940 conference, copies of which were distributed to those in attendance. Referring to the agenda for this meeting, he stated that it had not been prepared with a view to limiting the discussion nor to dictate the expression of a particular point of view, but rather to furnish suggested topics for consideration which involve administrative problems of special interest to the Sections.

The first item on the agenda related to a resolution adopted last year recommending the preparation and distribution of a Section handbook or manual. Comment was called for as to the usefulness of the tentative draft which had been prepared in response to this recommendation and suggestions were sought for its improvement. There was general criticism to the effect that the draft is too long and not indexed. The consensus of opinion reflected the desire on the part of each Chairman to be furnished with a separate copy of his Section's by-laws. It was suggested that what is most needed in the way of a manual is a short guide as to the mechanics of Section administration embracing such subjects as printing, the preparation and presentation of Section reports, and the like. It was considered that this information could be set forth in a few pages.

Pursuant to the primary objectives of the conference, namely, cooperation between the several Sections and the achievement of a coordinated program for the Association as a whole, each Chairman was asked to make a brief statement as to the plans of his Section for the current year. Many of the plans thus revealed involve matters of interest only to particular Sections and to members of the Association interested in special fields and consequently a complete review thereof will not be attempted here. Without minimizing the importance of plans not mentioned, reference will be made only to those which it is thought are of interest to the members of the Association generally.

Continuance of the regional conferences sponsored by the Section of Bar Organization Activities is planned by that Section during the current year. The places, territory embraced, and tentative dates were announced by the Chairman as follows: Raleigh, N. C. (North Carolina, South Carolina, Virginia, West Virginia, Tennessee, and Kentucky), January 15, 1942; Jacksonville, Fla. (Florida, Alabama and Georgia), January 17, 1942; Milwaukee, Wisc. (Minnesota, Illinois, Wisconsin, Michigan, Indiana and Ohio), February 27, 1942; Dallas, Texas, (Texas, New Mexico, Oklahoma, Arkansas, Louisiana, and Mississippi), March 27, 1942; Kansas City, Mo. (Missouri, Kansas, Nebraska and Iowa), April 18, 1942; New York, N. Y. (New England, New York, New Jersey, Delaware, Pennsylvania and District of Columbia), May 23, 1942.

In connection with the foregoing announcement, there was extended discussion of the usefulness of such conferences in promoting the work of the various Sections. This subject constituted a separate item on the agenda. It was suggested that several Sections might conduct programs at these conferences and thus bring some of the benefits of the Association to lawyers who do not attend the annual meetings. The opinion was also expressed that invitations to attend the conference of Bar Association executives should be broadened to include other interested members of state and local Bar Associations, it being pointed out that most Bar Association officers serve for only one year and the usefulness of the conference would not be fully realized if prospective future officers and other interested members are not afforded an opportunity to attend and participate.

Discussion of the subject was concluded by the adoption of two resolutions embodying the views of those present. The first recommended that the state and local Bar Associations be requested to designate representatives to attend such conferences and that in addition members of the

American Bar Association and all other lawyers in the region designated be invited to attend those sessions in which they are interested, namely, the sessions of the Section of Bar Organization Activities and the Junior Bar Conference and of such other Sections as indicate they will have a program.

The second resolution recommended the appointment of a Program Committee for each regional conference, to consist of a representative of the Section of Bar Organization Activities, a representative of the Junior Bar Conference, and a representative of the Sub-Committee of the Board of Governors on Sections, together with such persons representing other Sections as this Committee of three shall designate and that in working out such program the Committee consult with the officers of state and local Bar Associations in the region designated for the conference.

Attention was directed to the proposed Bankruptcy Administration Act now under consideration in Congress, by the Chairman of the Section of Commercial Law, who paid tribute to the fine cooperation existing between the Committee on Judiciary of the House of Representatives and the Section in the consideration of this Bill.

Among other activities, the Section of Criminal Law reported that it is assisting in the work of the Advisory Committee appointed by the Supreme Court of the United States to draft rules of criminal procedure in the United States District Courts and announced that it is expected a report will be forthcoming this year. The Chairman of this Section is serving as reporter for this Committee.

Despite the current chaotic condition of international law, the Section dealing with that subject reported that it is now working on several important matters in that field in close cooperation with the Department of State. Included in these subjects are reciprocal trade treaties, naval and military law, nationality laws, the protection of the rights of neutrals and matters involving international double taxation.

Continuation of the Public Information Program through radio addresses and platform speeches under the supervision of a national director and a separate organization in each state, was announced by the Junior Bar Conference. It was further stated that the Conference is working, in connection with this program, in cooperation with the administrative officers of the Association and the Association committees on American Citizenship, National Defense and Improving the Administration of Justice.

The Section of Municipal Law informed the conference that it has a most ambitious program under consideration. This program contemplates legal research to be made available to all municipalities in the United States through the cooperation of one of the large universities of the country. Plans have not been completed but they are designed to meet the needs of thousands of small municipalities which have not the means to provide adequate research facilities when they become involved in litigation dealing with important questions of municipal law.

Attention was directed, by the Chairman of the Section of Patent, Trademark and Copyright Law, to the report of the Temporary National Economic Committee in its studies of the patent law and legislation proposed and to be proposed in Congress as a result of this report. These matters are under consideration by this Section, but he urged that they are of vital importance to every lawyer and every citizen.

The Probate Division of the Section of Real Property, Probate and Trust Law, the Chairman of that Section stated, is now studying the probate statutes of each of the 48 states in order to ascertain what particular practices have proved successful. It is expected that a digest of the findings of this Division and possible recommendations will be reported in the future.

A number of new Section Committees which may be of general interest were announced. In the Section of Bar Organization Activities there is to be a new Committee on State Bar Association Secretaries. In the Section of Commercial Law, a Committee on Banking and a Committee on Corporations is proposed. In the Section of Taxation, the field of state and local taxation has been divided, so that separate committees will deal with each of the following subjects in that field: property taxes, income taxes, sales and use taxes, death and gift taxes and franchise and miscellaneous taxes.

President Armstrong directed attention to the problem which has arisen this year because of the sharp increase in printing costs and to its effect upon the work of the Sections. Reference was made to the action of the Board of Governors in creating an Emergency Committee on Printing Costs and Publication to deal with this subject. (A. B. A. Journal—November 1941—page 703). Assurances of cooperation were received from all the Section Chairmen and various suggestions were offered for effecting economies in order to conserve the limited funds of the Association. Among such suggestions were proposals to eliminate the verbatim transcript of Section proceedings, to eliminate rosters for all non-dues paying Sections, except the Junior Bar Conference, and to condense as much as possible the Section reports in the Advance Program.

In connection with the annual Section meetings, consideration was given to a number of questions: (a) whether the number of sessions can be reduced; (b) whether the House of Delegates should meet on Tuesday; (c) whether round table or division meetings should either be reduced in number or spread over a longer period of time; (d) whether an Assembly session should be held under the auspices of some Section at the 1942 annual meeting; (e) whether the length of annual meetings can be reduced by the simplification of Section programs, and (f) whether bi-annual Section dinners are feasible or advisable.

(Continued on page 833)

(Continued from page 831)

No definite conclusions were reached with respect to the foregoing matters but the general consensus of opinion among the Chairmen appeared to be that the number of sessions cannot be reduced and that these matters involving Section programs must largely be decided by the individual Sections. No particular objection was raised to a meeting of the House of Delegates on Tuesday, the primary concern of the Sections being that adequate time be given on the calendar of the House for proper consideration of the Section reports after the Section meetings have been concluded.

Secretary Knight expressed the opinion that the Sections are endeavoring to do too much in one year as a result of which we have a maze of concurrent meetings and an increasingly heavy burden in the cost of reporting and printing. While the Chairmen generally appeared reluctant to abandon the number of sessions to which they have been accustomed, various suggestions were offered by them to effect economies in time and expense.

The meeting concluded with a brief discussion of the constantly recurring subject of consideration of Section reports by the House of Delegates. Complaint was made that these reports have not been receiving adequate consideration by the House, due, in part at least, to the inability of the House to inform itself properly upon reports of a technical or specialized nature, and due also to the absence of many members of the House from the final sessions when Section reports are considered. It was stated that while the Sections are most anxious that their reports shall receive the approval of the House, they nevertheless do not desire that action be taken without full understanding of its import. The hope was expressed that the Committee of the House on Rules and Calendar, which is now studying this subject, will be able to devise a satisfactory plan for dealing with this important problem.

NOTICE BY THE BOARD OF ELECTIONS

THE following states will elect a State Delegate for a three-year term in 1942: Arizona; Connecticut; District of Columbia; Illinois; Iowa; Maine; Michigan; Mississippi; Montana; Nebraska; New Jersey; Oklahoma; Puerto Rico; South Carolina; South Dakota; Texas; Washington; and Wyoming.

In addition to a State Delegate being chosen for a three-year term, in the following jurisdictions a State Delegate will also be elected to fill a vacancy expiring with the adjournment of the 1942 Annual Meeting: Iowa, Puerto Rico, and South Carolina.

The State of Maryland will elect a State Delegate to fill a vacancy for the term which will expire at the adjournment of the 1943 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1942 must be filed with the Board of Elections not later than March 26, 1942. Forms for nominating petitions for the three-year term, and separate forms for nominating petitions to fill vacancies, may be secured from the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago. In order to be timely, nominating petitions must actually

be received at the headquarters of the Association before the close of business at 5:00 P. M. on March 26, 1942.

Attention is called to Section 5, Article V, of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State (or the territorial group) from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State (or the territorial group).

Unless the person signing the petition is actually a member of the American Bar Association in good standing, his signature will not be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers as they appear upon the petition.

Nominating petitions will be published in the next succeeding issue of the AMERICAN BAR ASSOCIATION JOURNAL which goes to press after the receipt of the petition. Additional signatures received after a petition has been published will not be printed in the JOURNAL. Special notice is hereby given that no more than fifty names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the States in which elections are to be held within thirty days after the time for filing nominating petitions expires. State Delegates elected to fill vacancies take office immediately upon the certification of their election. State Delegates elected for a three-year term take office at the adjournment of the 1942 Annual Meeting of the Association, which will be held the week of August 24th.

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Legal Aid

CHIEF Justice Stone has consented to become Honorary President of the National Association of Legal Aid Organizations. When that Association was formed in 1923, Chief Justice Taft became its first Honorary President. After his death he was succeeded by Chief Justice Hughes as Honorary President.

The significance of this relationship, which has now become virtually an established tradition, will be plain to the Bar. Put in its simplest terms it means that the humblest, the poorest, the most oppressed suitor can be told, and honestly told, that the highest judicial officer in the land is concerned that adequate ways and means shall be found and maintained to afford him legal advice, legal assistance, and justice according to law.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933

Of American Bar Association Journal, published Monthly at Chicago, Illinois, for October 1, 1941.

State of Illinois } ss.
County of Cook }

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Urban A. Lavery, who, having been duly sworn according to law, deposes and says that he is the Managing Editor of the American Bar Association Journal and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor, and business managers are:

Publisher, American Bar Association, 1140 N. Dearborn St., Chicago, Ill. Editor-in-Chief, Edgar B. Tolman, 30 N. LaSalle St., Chicago, Ill. Managing Editor, Urban A. Lavery, 1140 N. Dearborn St., Chicago, Ill. Business Manager, Urban A. Lavery, 1140 N. Dearborn St., Chicago, Ill.

2. That the owner is: American Bar Association, Walter P. Armstrong, President, Commerce Title Building, Memphis, Tenn.; Harry S. Knight, Secretary, Sunbury Trust & Safe Dep. Bldg., Sunbury, Pa.; John H. Voorhees, Treas., Bailey-Glidden Bldg., Sioux Falls, S. D.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

Urban A. Lavery.
Managing Editor

Sworn to and subscribed before me this 20th day of October, 1941.

(SEAL) Helen P. Lovelace.

(My commission expires November 23, 1943)

3-Minute Verdict Shocks 'Con' Man

(Reprinted from the New York Times, Oct. 17, 1941)

IN one of the speediest verdicts ever reached in General Sessions, Irving Sherman, 48 years old, a confidence man with a "knowledge" of the law acquired in Sing Sing, was found guilty in three minutes yesterday of a check forgery by which he had tried to use the State Insurance Fund to perpetuate a fraud.

A few hours before the jury of nine men and three women brought in the verdict, Sherman dismissed his assigned counsel, Arnold Ginsburg, to conduct his own defense. He did this despite the admonition of Judge Jonah J. Goldstein, who pointedly quoted Voltaire, to the effect that "a lawyer who defends himself has a fool for a client."

Sherman recalled for cross-examination all the State witnesses his counsel previously had questioned. He also called two defense witnesses, but refused to subject himself to his own examination. On 90 per cent of his questions Judge Goldstein sustained objections raised by Harris Steinberg, assistant district attorney. Then Sherman engaged in a forty-five-minute stentorian summing up of the evidence to the jurors, which one of the lawyers among the spectators smilingly remarked: "Certainly cooked his goose."

Sherman winked knowingly as the jurors filed out for a verdict. He paled, however, when a few moments after an attendant shut the door, the light above it flashed, revealing to the judge that the jurors had reached a verdict. Less than a minute later the foreman further shocked Sherman by announcing the word "guilty."

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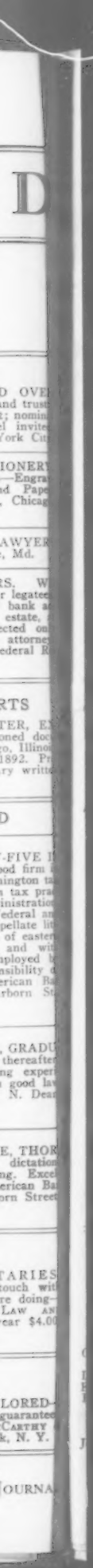

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